81-2350

No. 81-

FILED
JUN 25 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., and BELL TELEPHONE LABORATORIES, INC.,

Petitioners,

against

PHONETELE, INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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JUNE 25, 1982

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Appendix A

A-1

(Filed Dec. 3, 1981)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 77-3877

D.C. No. CV 74-3566-WPG

No. 77-2936

D.C. No. CV 73-2511-LTL

PHONETELE, INC.,

Plaintiff-Appellant,

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INCORPORATED; BELL TELEPHONE LABORATORIES, INCORPORATED

Defendants-Appellees.

DASA CORPORATION, ETC.,

Appellant,

vs.

GENERAL TELEPHONE COMPANY OF CALIFORNIA, ET AL.,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

OPINION

William P. Gray, U.S. District Judge, Presiding (No. 77-3877)

Lawrence T. Lydick, U.S. District Judge, Presiding (No. 77-2936)

Argued and submitted before a panel consisting of Hufstedler and Kennedy, Circuit Judges, and Claiborne, District Judge, May 7, 1979

Submission ordered vacated November 20, 1979

Reargued and resubmitted before a panel consisting of Kennedy and Fletcher, Circuit Judges, and Claiborne, District Judge, February 6, 1980

Before: KENNEDY and FLETCHER, Circuit Judges and CLAIBORNE,* District Judge.

KENNEDY, Circuit Judge:

These consolidated appeals present to this circuit the question whether a telephone company may be sued for damages and injunctive relief for attempting to monopolize and restrain trade in the distribution and sale of telephone terminal equipment.[1] The case requires us to reconcile the antitrust laws with the regulatory regime established by the Communications Act of 1934, 47 U.S.C. §§ 151-609 (1976 & Supp. III 1979) [FCA or Act].

Plaintiff Phonetele, Inc., manufactures and sells the "Phonemaster," equipment connected to a telephone to prevent the user from placing calls beyond a predetermined area. Plaintiff DASA Corp. manufactures equipment known as "Divert-A-Call" which is connected to a telephone and effects automatic transfer of an incoming call to another telephone number. Both devices are attached by electric connections.

The complaints in these actions arose from the tariffs filed by the defendants with the Federal Communications Commission [FCC] and the California Public Utilities Commission [CPUC], tariffs which prohibited the direct electrical connection of customer-provided equipment to the telephone without the use of a plate-like connecting device, called a "protective connecting arrangement" or "PCA," supplied by the telephone company. Plaintiffs allege that the filing and implementation of these tariffs violated the antitrust laws.

DASA filed its complaint in 1973, alleging violations of sections 1 and 2 of the Sherman Act by General Telephone of California [General Telephone or General], by Ford Industries as manufacturer of an automatic call diverter, and by others unnamed. Damages and injunctive relief were sought.[2] As for the section 1 violations, the complaint generally alleges that since 1966 the defendants combined to unreasonably restrain trade in

* Honorable Harry E. Claiborne, Chief Judge, United States District Judge for the District of Nevada, sitting by designation.

the call diverter market in those areas of California in which General has a state-granted monopoly in telephone system operation. The alleged goal of the concert and agreement was to suppress competition.[3] DASA's section 2 monopolization claim is that General and its co-conspirators have controlled at least 90 percent of the automatic call diverter market in those areas of California in which General operates and that defendants have monopolized the market and have undertaken to destroy actual and potential competitors.[4]

Phonetele's 1974 complaint charges that American Telephone & Telegraph Company (AT&T), the 23 operating companies in which it has major interests, and AT&T subsidiaries Western Electric and Bell Telephone Laboratories,[5] have combined and agreed to restrain commerce in the marketing, sales, and distribution of the Phonemaster, conspired to monopolize the terminal equipment market, and have effected tying arrangements, all in violation of sections 1 and 2 of the Sherman Act, and section 3 of the Clayton Act. Phonetele claims that AT&T and its operating companies control approximately 80 percent of the nation's telephone lines, and that this gives AT&T complete power over all 1,700 independent telephone companies which must use these interstate lines. Misconduct in the establishment and enforcement of an AT&T tariff requiring a coupling device for equipment like Phonetele's is also charged. Finally, Phonetele alleges AT&T was wrongfully responsible for conforming state tariffs and enforcement efforts. Phonetele alleged damages in excess of $30 million. It sought trebling of those damages and injunctive relief. Phonetele has since stated that it will no longer seek injunctive relief.[6]

The district courts below dismissed the actions on the grounds that the FCC (and state utilities commissions where appropriate) had "exclusive jurisdiction" over the subject of interconnection of terminal equipment with the telephone system and that the FCA conferred an implied antitrust immunity for the activities of the defendants.[7]

The immunity issue in Phonetele's appeal concerns the nature and extent of the FCC's regulation pursuant to the scheme created by the Act; DASA's case involves additional and similar issues concerning the CPUC.

I

Regulatory Scheme

The FCA provides for the regulation of telecommunications common carriers by the FCC and requires carriers to file tariffs with the FCC covering "practices" as well as charges.[8] Before changing any of its practices by filing a new tariff, the carrier must give ninety days notice to the FCC and the public.[9] The requirement that carriers file tariffs is the primary mechanism of regulation. Once a tariff becomes effective, the carrier is required to adhere to its provisions.

Section 201(b) requires that "[a]ll charges, practices, classifications, and regulations" be "just and reasonable." The section further states that "any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful." Any unjust or unreasonable discrimination in carrier conduct is unlawful. 47 U.S.C. § 202 (1976). Section 201(b) authorizes the FCC to prescribe "such rules and regulations as may be necessary in the public interest" to implement the Act's mandates.

Free competition is not irrelevant to the objectives of utility regulation, but determinations of whether a company's practices are in the public interest as defined by the Act require FCC consideration of factors other than competition. Such factors include network safety and efficiency, the need of the public for reliable service at reasonable rates, the proper allocation of the rate burden, the financial integrity of the carriers, and the future needs of both users and carriers.[10]

Whenever a new tariff is proposed, the FCC may, upon its own initiative or upon the complaint of an interested party, hold hearings concerning the lawfulness of the practice, and may suspend the tariff.[11] Section 205 authorizes the FCC, after hearings and

upon a finding that a tariff does or will violate the Act, to issue a cease and desist order and to prescribe conduct to satisfy the Act's standards.[12]

The act gives the FCC broad jurisdiction over interstate and foreign telephone communications and the carriers which provide such communications; intrastate communications are excepted.[13] General Telephone provides service to a part of California only and so is not subject to the comprehensive direct supervision of the FCC and does not file general tariffs with it. To the extent the facilities of a connecting carrier such as General are used for interstate or foreign communications, it usually files a state tariff that conforms to the tariff the interstate carrier has filed with the FCC. In the case of telephone service, this mechanism of a "conforming tariff" means that when the facilities of an intrastate telephone company are used for interstate communications, the company is thus indirectly subject to the tariffs filed by AT&T.

Terminal equipment is primarily used for intrastate services and is generally provided by a connecting carrier rather than an interstate carrier. For this reason, state public utility commissions have in the past exercised authority over the connection of such equipment, as CPUC did with General. Now, however the FCC asserts "primary authority" over interconnection of customer-provided equipment, to the exclusion of state regulation.[14] This exercise of jurisdiction was affirmed in *North Carolina Util. Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).

II

Challenges to AT&T's Exclusion of Foreign Attachments.

Tariffs filed with the FCC immediately following passage of the Communications Act generally prohibited the interconnection of customer-provided equipment.[15] The restrictions were similar to those contained in tariffs required by most state utility commissions before the Act was adopted.[16]

In 1965, AT&T's tariff prohibiting foreign attachments was challenged in an antitrust action. The Court of Appeals held that the antitrust complaint was properly stayed while the case was referred to the FCC to determine the legality of the prohibition under the FCA. *See Carter* v. *American Tel. & Tel. Co.*, 250 F. Supp. 188 (N.D. Tex.), *aff'd*, 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967).[17] In 1966 the FCC began its investigation, and in 1968 the Commission issued its watershed decision in *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.2d 571 (1968) [*Carterfone*]; this decision was strongly presaged by the foundation laid in *Hush-A-Phone Corp.*, 22 F.C.C. 112 (1957) (on remand).[18] The FCC found the then-applicable tariff unreasonable because it "prohibit[ed] the use of harmless as well as harmful devices." *Carterfone*, 13 F.C.C.2d at 424. The FCC struck down the entire tariff and allowed the carriers to "submit new tariffs which will protect the telephone system against harmful devices, and [which] may specify technical standards if they wish." *Id.* at 426. The Commission offered no specific guidance as to the content of the new tariffs.

AT&T responded in November of 1968 by filing an amended version of Tariff No. 263 [the post-*Carterfone* tariff]. This tariff permitted acoustical or inductive connection of customer-provided terminal equipment. It continued, however, to prohibit the direct electrical connection of network control signalling units.[19] Under the tariff, these devices could only be interconnected indirectly by means of the protective connecting arrangement (PCA). The PCA had to be provided and installed by the telephone company before equipment such as a call diverter could be connected.

Various parties objected to the tariff and requested the FCC to reject or suspend it. The FCC declined to do so but it also declined to affirm its validity. The Commission ruled that the post-*Carterfone* tariff filed by AT&T did not violate the precise holding in *Carterfone*. *American Telephone and Telegraph Co. "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605

(1968), *reconsideration denied*, 18 F.C.C.2d 871 (1969) [*AT&T "Foreign Attachment" Tariff Revisions*].[20] The Commission further indicated that it planned to undertake a broad study of interconnection practices and permitted the tariff to go into effect, while explicitly and significantly withholding its approval of the tariff.[21]

Proceeding informally at first, the FCC embarked on an extensive investigation of the interconnection issue.[22] These proceedings culminated in *Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)—First Report and Order*, [*First Report*].[23] The FCC concluded that the conditions on interconnection of customer-provided terminal equipment contained in Tariff No. 263 unnecessarily restricted the customer's right to make reasonable use of telephone services and facilities and that such conditions constituted an unjust and unreasonable discrimination. In the same report, the FCC prescribed a system of registration for customer-provided equipment based on various technical specifications. *See* 47 C.F.R. §§ 68.100-.506 (1980). For equipment which did not meet the specifications, the carriers were permitted to require PCAs.

Developments before the CPUC have loosely paralleled those before the FCC. General Telephone's tariffs filed with the CPUC prior to 1966 prohibited the connection of customer-provided equipment to the telephone system. Before *Carterfone*, the CPUC strongly disapproved General's restrictions on devices like Divert-A-Call.[24] After *Carterfone*, General filed a tariff with the CPUC which mirrored the amended tariff No. 263 filed by AT&T with the FCC. This General tariff was challenged in 1972.[25] Subsequently, on October 24, 1973, the CPUC commenced an investigation into the terms and conditions of interconnection of customer-provided equipment. On April 22, 1975, the PUC issued an interim Decision, which became final in May, 1976, and which, like the FCC First Report, adopted a dual system of direct electrical connection of certified devices and the use of protective connecting arrangements for uncertified devices.

Following is a summary of the regulatory pattern applicable to the interconnection of customer-provided equipment. Prior to 1966, the tariffs filed by General Telephone and AT&T prohibited the connection of any customer-supplied terminal equipment and there was virtually no active regulatory effort by either the CPUC or the FCC. The year 1966 marked the start of agency regulatory activity, and between 1966 and 1975 both the FCC and the CPUC undertook studies of the problem. The *Carterfone* decision in 1968 established that there was no justification for a telephone company to enforce a blanket prohibition on all foreign attachments and it further established that tariffs for such attachments should be designed only to prohibit devices dangerous to the system. After the FCC *Carterfone* decision, the direct electrical connection of terminal equipment was affected by telephone company tariffs which required PCA's, furnished by the company, as a condition to permitting direct electric connection of terminal equipment. In 1975, the FCC proposed a comprehensive new plan based largely on the requirement of registration or certification for terminal equipment. The CPUC proposed a similar plan, which become final the following year.

Phonetele first entered the business of developing and manufacturing telephone restriction equipment in late 1970, about two years after the post-*Carterfone* tariffs were filed. Phonetele's complaint was filed on December 15, 1974, and is based on the defendants' conduct after the FCC's *Carterfone* decision. In addition to alleging that the PCA requirement was anticompetitive, Phonetele's complaint alleged that AT&T misinterpreted its own tariffs, delayed the availability of PCA's for Phonemasters outside of California, and charged three and one half times as much for PCA's outside California as in California, all without justification.[26] DASA's complaint was filed in late 1973 and was based primarily on acts which occurred during the period of active regulatory investigation by the FCC and CPUC but before the registration program was adopted. DASA alleged that the

pattern of conduct described in controlling AT&T tariffs and tariffs filed by General with the CPUC violated sections 1 and 2 of the Sherman Act.[27]

III

Implied Antitrust Immunity

Whether there is an implied immunity under the Communications Act is a question of Congress' intent in passing the Act. *Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, 555 F.2d 687, 691 (9th Cir. 1977), *cert. denied in part*, 434 U.S. 1008, *vacated and remanded on other grounds*, 437 U.S. 322 (1978).[28] The Supreme Court has given repeated emphasis to the proposition that antitrust immunities are to be strictly construed and not lightly inferred. An implied immunity may be found only where there is "a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *United States* v. *National Ass'n of Sec. Dealers*, 422 U.S. 694, 719-20 (1975) [*NASD*]; *See also Gordon* v. *New York Stock Exch., Inc.*, 422 U.S. 659, 682 (1975). "These widely repeated refrains . . . are of limited value in application,"[29] however. One point must be plain: we must recognize there is no simplistic and mechanically universal doctrine of implied antitrust immunity; each of the Supreme Court's cases is decisively shaped by considerations of the special aspects of the regulated industry involved. From this two further points follow. First, we do not accept as dispositive any of the elaborate taxonomies that have attempted to wrest an abstract framework out of the case law.[30] Second, the uncritical transfer of abstract characterizations about the implied immunity of one industry to the different circumstances of another industry is not a reliable method of analysis.[31] Vague metaphors such as "aggressive regulation" are likewise inadequate tools of analysis.

Relying heavily on *NASD* and *Gordon*, defendants posit three principal arguments in support of implied immunity. First, defendants claim application of the antitrust laws would subject them to inconsistent and conflicting standards and obligations, thereby demonstrating a clear repugnancy between the antitrust

laws and the FCA. Second, defendants maintain the conduct at issue here is subject to pervasive regulatory authority and thus impliedly immune from the antitrust laws. Third, defendants argue that even if the regulatory scheme is not deemed pervasive, antitrust immunity is required because the conduct is aggressively regulated by an agency under direct statutory authority.

A. *Gordon*

Turning to the third argument first, we cannot accept defendants' overly broad reading of *Gordon*. According to the defendants, *Gordon* requires antitrust immunity where the challenged conduct is aggressively regulated by an agency vested with direct statutory authority to do so, regardless of whether the regulatory scheme, taken in its entirety, is sufficiently "pervasive" as to require immunity, and regardless of whether the agency ultimately approves or disapproves the challenged conduct. On close examination *Gordon* does not support such an extensive immunity doctrine.[32] The necessity of considering implied immunity decisions in the context of the industries they govern is well illustrated by *Gordon* and the other securities cases. The securities laws were conspicuously marked from their outset by a reliance on self-regulation. The need to allow a self-regulating industry the freedom to discharge its statutory duties and the inappropriateness of subjecting to antitrust liability the rulemaking and enforcement functions Congress charged the industry with performing decisively shaped the Court's implied immunity analysis in the securities cases.[33]

Several reasons absent from this case combined to support the Court's decision in *Gordon*. The practice of fixed exchange rates at issue in *Gordon* had been explicitly considered by Congress in passing the Securities Exchange Act of 1934. Furthermore, section 19(b) of the Act, 15 U.S.C. § 78s(b) (1976), expressly gave the SEC authority over exchange practices with respect to "the fixing of reasonable rates of commission," notwithstanding Congress' knowledge that this would otherwise be a classic per se antitrust violation. *See Gordon*, 422 U.S. at 664-67, 685. This

explicit grant of authority to the SEC, together with Congress' particular awareness of the very price-fixing practices challenged in the antitrust suit, was evidence that Congress intended the Commission's authority to displace the antitrust laws. A second difference between these appeals and *Gordon* is that the Court held that the SEC's supervision over the practices of the regulated entities was the legal equivalent of "an affirmative order to the exchanges to follow fixed rates." *Id.* at 689 n.13.

B. *NASD*

We also reject defendants' pervasive regulation argument. According to AT&T and General, *NASD* requires that antitrust immunity be implied where the challenged activity is subject to regulation by an agency under a pervasive or comprehensive regulatory scheme, regardless of whether the agency actually exercised its authority to regulate the conduct in question. In *NASD* the Government sought injunctive relief against agreements to fix prices and restrict sales of mutual funds in secondary market transactions between dealers, between investors and dealers, and between investors. 422 U.S. at 701. The Government's complaint challenged both vertical (counts II-VIII) and horizontal (count I) anticompetitive activity. *Id.* at 701-02. The Court concluded that the vertical restraints were immune from antitrust challenge, but it is critical that the restraints so immunized were explicitly contemplated by statute.[34]

Count I of the Government's complaint alleged a horizontal conspiracy between NASD and its members to prevent the growth of a secondary dealer or brokerage market for mutual fund shares by means of anticompetitive interpretation and extension of NASD rules. *Id.* The vertical agreements could not have been implemented without some form of concert, *i.e.*, rulemaking and rule enforcement. Thus the defendants' horizontal conduct was logically necessary to carry out the legitimate agreements and the sanctioned vertical restraints, if not directly responsive to

a regulatory command. Therefore the Court reasoned the concerted activity acquired a kind of derivative immunity by virtue of its relation to the immune restraints implemented by the concerted action.[35]

Antitrust immunity is not conferred by the bare fact that defendants' activities might be controlled by an agency having broad powers over their conduct. There is no general presumption that Congress intends the antitrust laws to be displaced whenever it gives an agency regulatory authority over an industry. Cases prior and subsequent to *NASD* preclude such an expansive immunity doctrine. *See, e.g., Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973). *Cf. Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 597 (1976) (implied state law exemption). In this respect the area of immunity from antitrust laws is not coterminous with areas of agency jurisdiction or agency expertise. The zones of application of each doctrine in specific cases may be quite different, depending particularly on the specific regulatory history preceding a given lawsuit.

There are several relevant distinctions between *NASD* and these appeals which indicate immunity does not arise in this case. First, as was true in *Gordon*, the *NASD* Court concluded that when Congress passed the controlling securities statutes, it was aware of the challenged anticompetitive practices and intended to permit them unless the SEC determined otherwise. *See* 422 U.S. at 722-28. The Court construed the legislative history to mean that Congress intended to give the SEC the exclusive power to disapprove the challenged practices. There is no corresponding legislative history in the case before us. The FCC is not necessarily equipped to police competition in the furnishing of telephone terminal equipment or to enact rules in this regard, other than as necessary to protect the system from damage. Neither congressional mandates nor expressed agency policy leads to any different conclusion. Second, in both *Gordon* and *NASD* the Court concluded that the SEC had continued to sanction the challenged practice during the period covered by the antitrust complaint.

well as many years previously. That crucial factor is conspicuously absent from this case; in fact the contrary is true.[36] Third, the nature of the SEC's regulatory responsibility under the Maloney Act differs decisively from the FCC's responsibility under the FCA. The SEC is required to disapprove any change or addition to an association rule "unless such change or addition appears to be consistent with the requirements of . . . this section." 15 U.S.C. § 780-3(j) (1970) (now codified in 15 U.S.C. § 78s(b)(2) (1976)). In contrast, the Commission is not required under law to pass any judgment on a proposed tariff, and it does not necessarily approve as agency policy the content of every tariff permitted to go into effect. *MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365, 374 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); *Associated Press* v. *FCC*, 448 F.2d 1095 (D.C. Cir. 1971). Fourth, in *NASD* the Court found that the practices challenged in count I were closely related to the activities challenged in counts II-VIII, and the latter were expressly contemplated by the federal statutes. There is no corresponding specific statutory authorization, however, for the allegedly anticompetitive tariffs challenged in this case. *See also MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 462 F. Supp. 1072, 1094-95 n.27 (N.D. Ill. 1978); *Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, 477 F. Supp. 251, 257-58 (D.Conn. 1978), *rev'd*, 651 F.2d 76 (2d Cir. 1981). We do not read *NASD* to indicate that the FCA-based immunity is either a logical requirement of that decision or consistent with controlling analytic principles generally.[37]

The most compelling distinction in this case, however, is the *Carterfone* mandate, which may be read not only as precluding a repugnancy argument, but also as precluding an inconsistency argument and affirmatively suggesting that an antitrust remedy is eminently consistent with and complementary to the regulatory scheme.[38] The *Carterfone* decision was itself responsive to a stay in an antitrust case pending in the federal courts, and the FCC's

decision contemplated that the federal court would "pass ultimately upon the antitrust issues after proceedings before the Commission should be concluded." *Carterfone*, 13 F.C.C.2d at 421.

A regulatory mandate sufficient to confer implied antitrust immunity may in some cases exist in the presence of the following three elements: First, explicit congressional approval of the ultimate anticompetitive effect of the challenged conduct; second, explicit authorization by Congress to an agency or private entity to order the challenged anticompetitive conduct; and third, no inconsistency between the challenged conduct and an express policy of the governing agency. Such a mandate is absent here. Instead of the three elements outlined above, there is clear inconsistency between the challenged conduct and the agency's interpretation of regulatory policy. The case before us does not present the elements that would support a finding of implied immunity under this analysis. To the contrary, we find the *Carterfone* mandate permits freedom of choice to customers and allows system access to competitors and foreign equipment, subject only to restrictions necessary to avoid damage to the telephone network to preserve its utility for the customer.

C. *Carterfone*

Defendants' primary contention is that after the *Carterfone* decision the regulatory agencies put the carriers on the horns of a dilemma: defendants were required to expand opportunities for the use of customer-provided equipment with the nationwide telecommunications network, but at the same time were purportedly charged with ensuring that the increased use of customer-provided equipment would not endanger the safety, reliability, and efficiency of the network. These obligations, they claim, are conflicting and inconsistent unless antitrust immunity is implied; otherwise, the unidimensional focus on competition embodied in the antitrust laws would conflict with the broader concerns embraced by the public interest standard. Thus, from the regulated entity's viewpoint, a plain repugnancy allegedly exists

between the antitrust laws and the Communications Act. While we acknowledge that this argument has some force, we cannot agree that a perceived repugnancy is sufficient to imply immunity—there must be an actual repugnancy between the antitrust laws and the regulatory system. Here, no such actual repugnancy is present; indeed we find the antitrust remedy complementary to the regulatory scheme clarified by *Carterfone*.[39]

The concept of plain repugnancy must be examined from both the agency's and the regulated carrier's perspective. The rules for implying antitrust immunity on the basis of regulatory statutes reflect two broad concerns: the agency must have sufficient freedom of action to carry out its regulatory mission, and the regulated entity should not be required to act with reference to inconsistent standards of conduct. *See NASD*, 422 U.S. at 722-25; *Gordon*, 422 U.S. at 689.[40] In short, the primacy of the regulatory regime must not be threatened, either from the agency's or the regulated entity's viewpoint.

According to AT&T, finding no immunity in this case would unfairly subject it to conflicting standards with potential liability for violation of either and would also impair the functioning of the regulatory process.[41] We agree with AT&T that where an actual conflict between the Sherman Act and the FCA exists, courts should not reconcile the two statutes in such a way that the rational choice for AT&T is to ignore the FCA standards and attempt to comply with the antitrust laws. Thus, for example, where conduct is compelled by the regulatory agency, not implying antitrust immunity would be unfair to the regulated entity and would frustrate agency policies.

AT&T argues that the FCC adopted the post-*Carterfone* tariffs when it permitted them to go into effect and that it is entitled to antitrust immunity accordingly.[42] We reject this contention. The FCC does not expressly approve or adopt as agency policy the content of every tariff it permits to become effective. By permitting a tariff to go into effect, the FCC does not assert that it has examined the content of the tariff and found it necessary or appropriate to effectuate the regulatory program, nor does it have

an obligation under the Act to make such a finding. *See* 47 U.S.C. § 204 (1976); *MCI Telecommunications Corp.* v. *FCC*, 561 F. 2d 365, 374 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); *Associated Press* v. *FCC*, 448 F.2d 1095 (D.C. Cir. 1971). In the instant case, for example, the FCC was explicit in not embracing as agency policy the precise content of the post-*Carterfone* tariffs. It permitted the tariffs to go into effect while the agency conducted its own examination of the interconnection issue, but emphasized that "in doing so we are not giving any specific approval to the revised tariffs." *AT&T "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d at 610. More particularly, we do not believe the FCC approved the tariff with respect to antitrust considerations or with the kind of endorsement necessary for antitrust immunity.[43]

From the FCC's perspective, applying the antitrust laws in this case involves no conflict between pro-competitive antitrust policies and agency policies. The FCC did not adopt the post-*Carterfone* tariffs as interim agency policy, and it eventually determined that the requirement of a PCA for all interconnections of customer-provided equipment was unreasonable under the public interest standard of the FCA.[44] To permit a court additionally to hold the same conduct unlawful under the Sherman Act does not jeopardize any policy adopted by the agency.[45]

The final point of AT&T's and General's plain repugnancy argument is grounded in the remedial structure of the FCA. They contend that the Act provides a complete and self-contained remedial scheme, including availability of damages, for violations of the public interest standard. We note this involves a number of suppositions. First we are asked to find an implied legislative intention to award damages to competitors for competitive injury specifically, and we are asked to make the further inference that the assumed remedy was impliedly intended to displace the antitrust laws. Potential liability for violation of the FCA also is part of AT&T's contention that it is subject to sanctions under conflicting substantive standards.

Although we think the assertion that damages are available to competitors under the FCA is open to question,[46] the existence of the remedy would not dictate immunity from the antitrust laws in any event.[47] First, the mere existence of a damages remedy within the Act does not indicate a congressional intent to displace the antitrust laws. The extent of the remedy differs significantly from the reach of the antitrust laws, so it is more probable Congress meant to supplement rather than displace the antitrust laws.[48]

AT&T's argument that the FCA's possible damages remedy and the antitrust laws subject it to conflicting substantive standards is nothing more than a restatement of its principal contention, already discussed above. To the extent the carrier's conduct violates the FCA, those actions were neither compelled by the FCC nor adopted as agency policy. Such conduct should be and is subject to antitrust scrutiny since it is the product of the regulated entity's independent initiative and judgment.[49] Conduct is exempt from the antitrust laws only when the regulated entity is required to pursue a particular course of action to comply with an identifiable and specific mandate of the regulatory statute.

We believe that this discussion of immunity applies with equal force to Phonetele's allegations of harmful ancillary practices by AT&T.[50]

D. *State Regulation*

DASA's complaint is based principally on General's filing of a state tariff conforming to the amended No. 263. Some of the matters pleaded in the complaint, such as the rates charged in connection with the PCA's, appear to be entirely regulated by the CPUC. Prior to 1974, state commissions had broad authority to regulate interconnection practices.[51] General has not specifically argued that the state action exemption applies to the facts of this case, although it has argued that state regulatory activity should be judged under the same standards as FCC regulation, since the state regulation is itself a federal policy of the Communications

Act. Irrespective of the standard we apply, state action exemption or federal immunity, the result is identical: the challenged conduct is subject to antitrust scrutiny. To the extent federal policy embraces state regulatory activity, the foregoing discussion is applicable, *see* TAN *28-50*, pp. 10-20, *supra*, and immunity from the antitrust laws will not be implied. As the following analysis indicates, moreover, the possibility of immunity based on *Parker* v. *Brown*, 317 U.S. 341 (1943), is similarly foreclosed.

The most recent Supreme Court decision analyzing the scope of the state-action exemption is *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). There, in reaffirming its earlier precedents in this area, the Court distilled from those prior decisions two requirements necessary to obtain immunity under *Parker* v. *Brown*: (1) the challenged restraint must be clearly articulated and affirmatively expressed as state policy; and (2) that policy must be actively supervised by the state itself. *Id.* at 105. *See also New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978).[52] The Court has clearly stated that "state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." *Cantor*, 428 U.S. at 592-93 (footnotes omitted).[53]

In light of the foregoing principles, we conclude that the CPUC never embraced the PCA tariff in such a way as to make antitrust immunity appropriate.[54] The CPUC did not strike down the PCA tariff when it was filled by General, but this fact alone is insufficient to confer *Parker* immunity. *See, e.g., Cantor*, 428 U.S. at 592-93; *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 790-91 (1975).

We do no think the oversight exercised by the CPUC prior to announcement of its registration program constituted clear evidence of an active state policy to displace competition in the area of customer-provided equipment.[55] The CPUC did order General to permit connection of the Divert-A-Call subject to agreement on safety measures, and in late 1973 the CPUC began an

investigation into interconnection practices. As with regulation by the FCC, however, a competitor may sue for damages based on conduct which occurred before the agency adopted any policy on interconnection of foreign attachments, since a decision in such a suit, rendered after disapproval by the agency, could not threaten to disrupt a considered policy of the CPUC.[56]

IV

Antitrust Liability and the Significance of Regulation

Our holding that appellees have no immunity does not mean that we disregard their status as a regulated common carrier. That status is relevant; it is a "fact of market life."[57] While a given regulatory scheme may not amount to the degree of necessity required to confer implied immunity on all activities of a regulated entity, some degree of necessity may be established as a matter of fact in individual cases. When the regulated entity assertedly attempts to respond to its duties as a common carrier by filing and implementing an anticompetitive tariff, the antitrust laws do not apply to the tariff without regard to the technical and legal constraints flowing from the regulatory structure. If a defendant can establish that, at the time the various anticompetitive acts alleged here were taken, it had a reasonable basis to conclude that its actions were necessitated by concrete factual imperatives recognized as legitimate by the regulatory authority, then its actions did not violate the antitrust laws. At this stage of the proceedings, it appears this inquiry will depend largely on whether the facts show the companies did reasonably conclude, given their expertise, that uncontrolled NCSU interconnection would endanger their own equipment or disrupt their own signal transmissions in identifiable ways, and also that the tariff as filed was the most reasonable, narrowly focused mechanism then available to prevent such real harm from occurring.[58] These matters must be developed at trial.

These factual justifications, the resolution of which is necessarily open at this point, are to be distinguished from the various

legal issues in the case which we now foreclose. The defendants may not justify their actions based on some mistake of law in interpreting the FCA, or judicial or FCC decisions. It will not be open to a defendant to argue that it was entitled as a matter of right to file any tariff it chose or that it was obliged to file a tariff absent the kind of factual necessities we have outlined above.[59] After the *Carterfone* decision, a defendant may not assert that it was entitled by law or agency policy to a monopoly in the furnishing and supply of terminal equipment.

The defense outlined above, the justification of regulatory necessity, must be established in the context of the specific claims made out in the pleadings.

A. *Tying Claims*

Phonetele alleges that AT&T violated section 3 of the Clayton Act, apparently by tying AT&T customers to acceptance of AT&T's interconnecting devices. Tying can constitute a per se violation of both section 3 of the Clayton Act and section 1 of the Sherman Act. *See Moore* v. *Jas. H. Matthews & Co.*, 550 F.2d 1207, 1211-13 (9th Cir. 1977). Conduct that does not meet the requirements of either per se rule, however, may still constitute a violation of the section 1 rule of reason. *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 500 (1969). *See United States Steel Corp* v. *Fortner Enterprises, Inc.*, 429 U.S. 610, 612 n.1 (1977).

The tying per se rule is exceptional in that it permits the defendant to offer justifications for undertaking the tie. Baker, *The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot*, 66 Va. L. Rev. 1235, 1250 (1980). *See, e.g., Moore*, 550 F.2d at 1217. A tie-in may be justified if implemented for a legitimate purpose and if no less restrictive alternative is available. *Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43, 51 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); *see, e.g., United States* v. *Jerrold Elecs. Corp.*, 187 F. Supp. 545, 557, 560-61 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961). The defendant, however, has the burden of showing that the tie-in was

reasonable for the entire time it was in effect. *See Jerrold Elecs. Corp.*, 187 F. Supp. at 558. If a regulated entity in this case can establish a defense consistent with the outline set out above, it will then have a justification which is a defense to the illegal tying charge.[60]

B. *Violations of Section 2 of the Sherman Act*

Both plaintiffs allege that defendants have monopolized in violation of section 2 of the Sherman Act. In general, a section 2 claim requires two principal elements in addition to antitrust injury: (1) possession of monopoly power in the relevent market and (2) willful acquisition or maintenance of that power. *Hunt-Wesson Foods, Inc.* v. *Ragu Foods, Inc.*, 627 F.2d 919, 924 (9th Cir. 1980, *cert. denied*, 101 S.Ct. 1369 (1981); *California Computer Prods.* v. *International Business Machs. Corp.*, 613 F.2d 727, 735 (9th Cir. 1979). A monopolist may not invidiously use its power in one market, even if lawfully obtained, to harm competition in another market. *See Pacific Coast Agricultural Export Ass'n* v. *Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). Although regulation in certain instances has been considered in determining if monopoly power exists,[61] we need not consider this issue at present. Rather, we are concerned with the conduct element of the monopolization claim.

Willful acquisition or maintenance means that the monopolist must have "engaged in 'willful' acts directed at establishing or retaining its monopoly, 'as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *California Computer Prods.*, 613 F.2d at 735 (quoting *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966)). The defendants here may protect themselves against a charge of willful monopolistic conduct by the same showing of a reasonable response to factual imperatives affecting a regulated common carrier that are applicable to the tying charge. *See Mid-Texas Communications Sys., Inc.* v. *American Tel. & Tel. Co.*, 615 F.2d 1372, 1389-90 (5th Cir.), *cert. denied*, 101 S.Ct. 286 (1980); Watson & Brunner, *Monopolization by Regulated*

"Monopolies": The Search for Substantive Standards, 22 Antitrust Bull. 559, 577-79 (1977). Similarly, in the absence of a direct showing of a specific intent to monopolize in support of any section 2 attempt or conspiracy claims, *see* Watson & Brunner, *supra*, at 583 n.23, the defendants may attempt to rebut an anticompetitive characterization of their conduct, *see generally California Computer Prods.*, 613 F.2d at 737, by the identical showing of reasonable conduct as a regulated carrier, *see id.*; *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 453 n.47 (9th Cir. 1979).

C. *Violations of Section 1 of the Sherman Act*

In response to the allegations of section 1 rule of reason violations in this case, defendants may offer their showing of reasonable conduct to rebut plaintiffs' evidence to the contrary. Should claims of section 1 per se violations other than tying be made, the defendants may respond by offering the same justification applicable to the tying claims.

D. *Conclusion: Regulatory Constraints as a Defense to Antitrust Claims*

As noted in the preceding sections, regulatory and operating constraints imposed on the defendants may be taken into account in ascertaining liability for the section 1, section 2, and tying allegations. That conclusion finds support in both caselaw and commentary. In *Silver* v. *New York Stock Exch.*, 373 U.S. 341, 360-61, 365 (1963), the Court was confronted with a challenge to the New York Stock Exchange's requirement that its members remove private direct telephone wires which had enabled a non-member broker/dealer to communicate directly with the trading desks of member firms. Although the Court refused to find antitrust immunity for exchange self-regulation, *id.* at 360-61, it nonetheless indicated that it was prepared to permit the "interposing of a substantive justification" for challenged conduct which, but for the regulatory setting, would have been deemed per se illegal. *Id.*[42]

Jacobi v. *Bache & Co.*, 520 F.2d 1231 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976), also involved rejection of an immunity defense and the creation of a mechanism permitting the antitrust court to evaluate the impact of a regulatory scheme in a per se context. The *Jacobi* court's analysis of the evidence presented at trial indicates its view that a standard of objective reasonableness was appropriate for examination of a stock exchange rule challenged as price-fixing.[63] *See id.* at 1239.

The Fifth Circuit, in *Mid-Texas Communications Sys., Inc.* v. *American Tel. & Tel. Co.*, 615 F.2d 1372 (5th Cir.), *cert. denied*, 101 S. Ct. 286 (1980), contemplated a request for implied immunity from a non per se claim. It held, in a case analogous to these consolidated cases, that section 201(a) of the FCA imposed a duty on Southern Bell Telephone Co. (Bell) to resist requests for interconnection of local independent telephone companies when it perceived those requests were not in the public interest.[64] Although unwilling to accord Bell antitrust immunity for its refusal to interconnect an applicant who wished to provide local phone service that Bell also wished to provide, the court granted Bell a new trial, recognizing that "to the extent that [Bell] based its decision . . . on articulable concerns relating to the public interest as defined in [the FCA, it was] entitled to a measure of protection from the effects of the antitrust laws." *Id.* at 1381.

The court ruled that, in resolving the monopolization claim the fact-finder was to consider the extent to which the regulatory scheme affected Bell's actions in refusing interconnection. *Id.* at 1385-90. The court concluded that: "The important issue in this case is whether Bell's action was reasonable under the antitrust law in light of the relevant factors concerning the public interest standard." *Id.* at 1390. Thus, the Fifth Circuit too has adopted a standard of objective reasonableness in assessing a regulated entity's conduct under the antitrust laws. Those principles are applicable here.

Our views are consistent with this and other courts' decisions on the significance of regulation in an antitrust case in other than an immunity context.[65] In *International Tel. & Tel.* v. *General*

Tel. & Elecs. Corp., 518 F.2d 913 (9th Cir. 1975) [*GT&E*], General Telephone & Electronics Corporation defended a charged violation of section 7 of the Clayton Act on the ground that it was part of a regulated, hence noncompetitively oriented industry, and argued that advantages were to be gained by further vertical integration of the telephone industry.[66] While dismissing the argument as irrelevant, this court clarified its position with regard to the effect of regulation:

> This is not to say that the nature and extent of regulation is, in the absence of an exemption, irrelevant from a factual perspective. The impact of regulation on pricing and other competitive factors is too obvious to be ignored. In the absence of an exemption claim, the fact of regulation is significant, but not because it embodies a doctrinal scheme different from the antitrust law; the sole legal perspective is that afforded by the antitrust law. Rather, the impact of regulation must be assessed simply as another fact of market life.

Id. at 935-36 (footnote omitted).[67]

As the preceding discussion indicates, the proper role of antitrust courts is to accommodate the peculiar circumstances under which regulated entities operate. Professors Areeda and Turner state the proposition succinctly:

> [A]ntitrust courts can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation. Just as the administrative agency must consider the competitive premises of the antitrust laws, the antitrust court must consider the peculiarities of an industry as recognized in a regulatory statute.

1 P. Areeda & D. Turner, *supra* note [55], at ¶ 223d. *See* Note, *supra* note [40], 57 Tex. L. Rev., at 825.

We thus recognize that those considerations advanced in favor of implied immunity, while not providing a blanket exemption, do bear on the case in a limited way. The logic of complying with a regulatory mandate is relevant as an antitrust defense, but the

same logic has internal limits which do not justify any and all acts ostensibly taken in response to the FCA. There is no absolute antitrust immunity or exemption by virtue of federal or state law in this case, but the defendants below may offer to show that their actions were justified by the constraints of the regulatory schemes in which they operated.

REVERSED and REMANDED.

FOOTNOTES

1. Many courts have addressed the question; the Second, Third, Fifth, and Eighth Circuits have refused to accord immunity under similar circumstances. *See Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, 651 F.2d 76 (2d Cir. 1981); *Sound, Inc.* v. *American Tel. & Tel. Co.*, 631 F.2d 1324 (8th Cir. 1980); *Essential Communications Sys., Inc.* v. *American Tel. & Tel. Co.*, 610 F.2d 1114 (3d cir. 1979); *Litton Sys., Inc.* v. *American Tel. & Tel. Co.*, 487 F. Supp. 942 (S.D.N.Y. 1980); *Monitor Business Machs., Inc.* v. *American Tel. & Tel. Co.*, 1978-1 Trade Cas. ¶ 62,030 (C.D. Cal. 1978); *Jarvis, Inc.* v. *American Tel. & Tel. Co.*, 481 F. Supp. 120 (D.D.C. 1978); *Interconnect Planning* v. *American Tel. & Tel. Co.*, 465 F. Supp. 811 (S.D.N.Y. 1978); *Macon Prods. Corp.* v. *American Tel. & Tel. Co.*, 359 F. Supp. 973 (C.D. Cal. 1973). In addition, the District Court for the District of Columbia has twice found no blanket immunity in a civil suit by the United States Government that concerned in part terminal equipment. *United States* v. *American Tel. & Tel. Co.*, 461 F. Supp. 1314 (D.D.C. 1978); *United States* v. *American Tel. & Tel. Co.*, 427 F. Supp. 57 (D.D.C. 1976). Several courts have addressed the analogous problem in the areas of private longlines communications and interconnection with local telephone companies, generally finding no implied immunity. *See, e.g., Mid-Texas Communications Sys., Inc.* v. *American Tel. & Tel. Co.*, 615 F.2d 1372 (5th Cir.), *cert. denied*, 101 S. Ct. 286 (1980); *MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 462 F. Supp. 1072 (N.D. Ill. 1978). One court of appeals has addressed the immunity issue in the fairly specialized field of radio/telephone paging systems, and found such immunity on the basis of the state action exemption. *Mobilfone* v. *Commonwealth Tel. Co.*, 571 F.2d 141 (3rd Cir. 1978). The general problem has attracted some attention in the literature. *See* Note, *The Application of Antitrust Law to Telecommunications*, 69 Calif. L. Rev. 497 (1981); Note, *Antitrust and Regulated Industries: A Critique and Proposal for Reform of the Implied Immunity Doctrine*, 57 Tex. L. Rev. 751 (1979); Note, *AT&T and the Antitrust Laws: A Strict Test for Implied Immunity*, 85 Yale L.J. 254 (1975).

2. In view of the actions taken by the FCC and the CPUC, DASA's request for equitable relief is moot.

3. Specifically, the complaint alleges, without limitation, the following acts on the part of the defendants:

> 1. The knowing filing of anticompetitive and unlawful tariffs prohibiting any interconnection of non-telephone company equipment;
>
> 2. Replacement of those tariffs, following a determination of their illegality, with new, purposefully anticompetitive tariffs requiring (a) the installation of unnecessary protective couplers actually designed to prevent the Divert-A-Call from working and (b) the payment of unnecessary and unreasonable installation and monthly charges;
>
> 3. Ford's sale of call diverters to General Telephone, accompanied by General's assistance of Ford's efforts to develop a

diverter comparable to DASA's, as well as General Telephone-Ford negotiations towards Ford's future sales to General of its improved call diverters;

4. General Telephone's use of the inconvenience and increased costs imposed on Divert-A-Call users by its tariffs as a point in the promotion of its own call diverters;

5. General's enforcement of its tariffs with threats of termination of Divert-A-Call users' phone service;

6. General Telephone's failure to follow the CPUC's 1972 order to negotiate in good faith with DASA reasonable assurances regarding quality control, installation, and repair that would permit direct connection of Divert-A-Calls;

7. Attempts by General and its co-conspirators to frustrate CPUC and other governmental proceedings dealing with interconnection in order to prolong their unfair competitive advantage.

These acts, DASA contends, harmed competition, telephone users, and itself.

4. In the event that the defendants and co-conspirators did not have monopoly power in the relevant market, DASA claims that (1) there was a dangerous possibility that a monopoly would be established; (2) the defendants and co-conspirators specifically intended to create such a monopoly; (3) the previously detailed acts were in furtherance of an attempt and conspiracy to monopolize; and (4) that attempt should be enjoined and damages should be awarded to DASA. Finally, DASA charges the defendants and co-conspirators with wrongful interference with DASA's contractual relations with its customers.

5. The complaint does not detail misconduct by Western Electric and Bell Telephone Laboratories, the manufacturing and research arms of AT&T. The complaint, in that it alleges an overly protective tariff and delay and error in the design of protective couplers, however, implies misconduct by the AT&T subsidiaries.

6. Phonetele charges that AT&T and the operating companies have misinterpreted the tariffs so as to apply to the Phonemaster while knowing that the Phonemaster is not covered by the tariffs, or, even if the Phonemaster is covered, knowing that the Phonemaster requires nothing more for connection than a simple terminal block. Phonetele, although objecting to the poor quality of the PCA made available in California and to the fees associated with that coupler, also complains of AT&T's delay in making a similar protective coupler available in other parts of the United States. When a similar coupler finally was made available outside of California, Phonetele charges that it was three and one-half times as expensive as the already too expensive California coupling arrangement. Phonetele claims that the imposition of protective coupling arrangements has caused unnecessary design and installation problems and attendant delays and has caused either Phontele or Phontele's customers to bear unnecessary costs.

In sum, Phonetele claims that AT&T and the operating companies have used their monopoly position to ensure that their own customers shall use only telephone company equipment.

7. *See Phonetele, Inc.* v. *American Tel. & Tel. Co.*, 435 F. Supp. 207 (C.D. Cal. 1977); *DASA Corp.* v. *General Tel. Co.*, 1977-2 Trade. Cas. (CCH) ¶ 61,610 (C.D. Cal. 1977).

8. Section 203(a) of the Act, 47 U.S.C. § 203(a) (1976), requires such carriers to file tariffs with the FCC "showing all charges . . . and showing the classifications, practices, and regulations affecting such charges."

9. 47 U.S.C. § 203(b) (1976).

10. *See Washington Util. & Transp. Comm'n* v. *FCC*, 513 F.2d 1142, (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). *See generally FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953); *Hawaiian Tel. Co.* v. *FCC*, 498 F.2d 771, 777 (D.C. Cir. 1974); *Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, 477 F. Supp. 251, 253 (D. Conn. 1978), *rev'd*, 651 F.2d 76 (2d Cir. 1981); Satellite Bus. Sys., 62 F.C.C. 2d 997 (1977).

There is a pro-competitive policy embodied in the FCA, although it is a corollary of the more basic policy of favoring customer utility and freedom of choice. *See* Proposal for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS), Second Report and Order, 58 F.C.C. 2d 736, 740 (1976) [*Second Report*].

11. 47 U.S.C. § 204 (1976). The FCC may suspend operation of the new tariff for up to five months. *Id.* § 204 (Supp. IV 1980). If the FCC has not completed its hearings by that date, the new tariff becomes effective subject to subsequent invalidation by the Commission.

12. Failure to obey an FCC order will result in a $1,000 fine for every violation, to be levied each day in the case of continuing offenses. 47 U.S.C. § 205(b) (1976). A carrier found to have violated the Act is liable to any person injured as a result of that violation for the "full amount of damages sustained," plus the attorney's fees of the injured person. 47 U.S.C. § 206 (1976). Section 207 establishes two avenues of recovery. An injured party may sue for damages "in any district court of the United States", or the party may file a complaint with the Commission pursuant to section 208. When a person claiming injury files a complaint with the Commission, the carrier is required to respond in writing. 47 U.S.C. § 208 (1976). If, after receiving the carrier's response, the party chooses to pursue his complaint, the Commission must investigate whether there appear to be any reasonable grounds supporting the complaint. *Id.* If the FCC concludes that the party is entitled to damages, it may order the carrier to pay the complaining party. 47 U.S.C. § 209 (1976).

For other descriptions of the FCA, *see, e.g., Essential Communications Sys., Inc.* v. *American Tel. & Tel. Co.*, 610 F.2d 1114, 1117-20 (3rd Cir. 1979); 446 F. Supp. at 1095; *Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, 477 F.Supp. 251, 253 (D.Conn. 1978), *rev'd*, 651 F.2d 76 (2d Cir. 1981).

13. The Act explicitly states that nothing contained in the chapter on common carriers "shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ." 47 U.S.C. § 152(b) (1976). That section further provides that, with certain exceptions (47 U.S.C. §§ 201-205 (1976)), the Commission shall not have jurisdiction over any "connecting carrier," *i.e.*, a carrier which provides interstate communication only through physical connection with another carrier not controlling it or controlled by it. *Id.*

14. In the present case, for example, the CPUC regulates General. Yet because terminal equipment generally has the potential to be used in interstate telephone connections, any restriction on its connection contained in the tariffs filed by AT&T would also apply to terminal equipment of intrastate carriers. *See* Telerent Leasing Corp., 45 F.C.C. 2d 204, 216 n.21 (1974). Until recently, however, there appeared to be no reason why a state could not apply more restrictive regulations for the interconnection of customer-provided terminal equipment.

15. In 1956 AT&T's blanket prohibition against connecting any equipment was struck down as a violation of the FCA. *Hush-A-Phone Corp.* v. *United States*, 238 F.2d 266 (D.C. Cir. 1956), *after remand*, 22 F.C.C. 112 (1957). The "Hush-A-Phone" was a cup-shaped device which attached to the mouthpiece of the handset to provide privacy for the speaker and quiet for others near the phone. There was no electrical connection between the telephone and the Hush-A-Phone. AT&T responded to this decision by filing a tariff which prohibited all "direct electrical connection" and interconnection by any means of customer-provided equipment. *See Carterfone*, 13 F.C.C. 2d at 437-38.

16. Many state public utilities commissions apparently felt that the telephone company must maintain end-to-end responsibility to preserve the integrity and reliability of the telephone network. For example, when some telephone companies permitted users to provide their own equipment, some state regulatory agencies ordered the carriers to purchase that equipment from the customers, thus highlighting the carrier's responsibility for maintaining the system. *See, e.g.* Bluffs & Winchester Tel. Co., P.U.R. 1915A 928 (Ill. Pub. Util. Comm'n 1915); Franksville Tel. Co., P.U.R. 1917A 270 (Wis. R.R. Comm'n 1916); *Littlepage* v. *Mosier Valley Tel. Co.*, P.U.R. 1918E 425 (Ore. Pub. Serv. Comm'n 1918); Swanson, P.U.R. 1920E 633 (Cal. R.R. Comm'n 1920). *See also, Quick Action Collection* v. *New York Tel. Co.*, P.U.R. 1920D 137 (N.J. Bd. Pub. Util. Comm'rs 1920) (rejecting attempt by customer to replace parts of telephone company equipment); *City of Los Angeles* v. *Southern Cal. Tel Co.*, 2 P.U.R. (n.s.) 247, 249-50 n.1 (Cal. R.R. Comm'n 1933) (same) (collecting cases).

17. The plaintiff in that action manufactured a device known as the "Carterfone." The Carterfone connected acoustically and inductively (as opposed to electrically) to the telephone and permitted the caller to connect his telephone to a two-way radio. *Carter*, 365 F.2d at 490.

18. *See* note 38, *infra*.

19. "Network control signals" are electronic impulses which activate connections between telephone centers, control switches, and start and stop the equipment used for billing. Devices that generate or activate network control signals are a category of terminal equipment known as "network control signaling units" (NCSUs). According to the defendants, plaintiffs' devices are network control signaling units and have the potential to disrupt system operations and message accounting if not properly manufactured, installed and maintained. *See also* notes 20 & 38, *infra* (discussing legal significance of NCSU/non-NCSU distinction).

20. We must emphasize that our interpretation of this statement by the Commission supports our holding. The post-*Carterfone* tariff was in "in conflict" with *Carterfone* in the sense that *Carterfone* did not deal specifically with customer replacement of terminal equipment, and the Commission had not been, in 1968, in a position to say whether the suggested possibility of greater danger from NCSUs was so substantial or unpredictable as to permit a blanket prohibition by AT&T. *See* note 21, 38, & 43, *infra* (discussing *Carterfone* and subsequent interpretations of decision).

21. In our opinion, these and other matters warrant further consideration by the Commission before it determines whether and what further action, if any, may be required. We believe that we will be in a better position to make these determinations after we have had a reasonable opportunity to closely observe the effects of the substantial changes now being effectuated by the telephone companies in their interconnection tariffs, the extent to which such changes satisfy reasonable requirements of their subscribers for . . . communication services or facilities, and the implementation by the telephone companies of their representations that they are actively engaged in devising equipment and operating procedures to meet the expressed needs of customers for flexible access to the switched network. Thus, *we will permit the tariff revisions to become effective as scheduled with the understanding that in doing so we are not giving any specific approval to the revised tariffs.*

AT&T "Foreign Attachment" Tariff Revisions, 15 F.C.C.2d at 610 (emphasis added).

The Commission took this stance because it was then "in no position to determine the extent to which" interconnection of customer-provided equipment could properly be permitted "consistent with efficient and economic telephone service." *Id. See also AT&T "Foreign Attachment" Tariff Revisions*, 18 F.C.C.2d 871, 873 (1969) (denying petitions for reconsideration); Western States Tel. Co., 19 F.C.C.2d 1968, 1072-73 (1969). It did, however, indicate that AT&T could consider the safety of the telephone network in formulating the new tariff. *Carterfone*, 14 F.C.C.2d at 572, 573 (denying petitions for reconsideration).

22. The FCC commissioned a study by the National Academy of Sciences and gathered information from other sources. In June, 1972, the FCC began formal proceedings to determine whether the post-*Carterfone* tariffs should be revised. Many users, equipment suppliers, and carriers participated in the hearings. The agency created a federal-state joint board to investigate interconnection practices. At about the same time, many state utilities commissions undertook independent investigations of the same issues. The potential for conflicting regulatory schemes led the FCC in 1974 to assert "paramount" or "primary" jurisdiction over the terms and conditions governing the interconnection of all equipment used in interstate communications. Telerent Leasing Corp., 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Util. Comm'n* v. *FCC*, 537, F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976). After the *Telerent* decision, state utilities commissions still have authority over the rates and charges for interconnection and carrier-supplied terminal equipment. *See North Carolina Util. Comm'n*, 552 F.2d at 1047-48.

23. 56 F.C.C.2d 593 (1975), *modified in part*, 57 F.C.C.2d 1216, (1976), *aff'd sub nom. North Carolina Util. Comm'n* v. *FCC*, 552 F.2d 1036, (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

24. In 1966, the CPUC found a call diverter functionally similar to the Divert-A-Call not to present any significant hazard to the telephone system. The CPUC ordered General to allow interconnection of that device without a connecting arrangement or to purchase and supply the device itself.

25. DASA's predecessor in interest, Com-U-Trol, filed an action before the CPUC in February, 1972, to compel General Telephone to allow interconnection of the Divert-A-Call. Although the CPUC ordered that General "shall permit the direct electrical connection of Divert-A-Calls to the telephone network subject to the condition that complainant shall provide reasonable assurances that quality control, installation, and repair procedures . . . necessary for the preservation of network integrity and safety will be uniformly followed," Interim Decision N. 80972, Com-U-Trol and General were unable to come to agreement on the necessary procedures.

26. *See* TAN 5 & 6, p. 3, and notes 5 & 6., *supra*.

27. *See* TAN 2-4, pp. 2-3, and notes 2-4, *supra*.

28. No section of the FCA expressly confers immunity in the area of interconnection, and defendants do not contend Congress intended any blanket immunity. *See Sound, Inc.* v. *American Tel. & Tel. Co.*, 631 F.2d 1324, 1327 (8th Cir. 1980). Rather, the narrower claim is that immunity should be implied in the discrete context of interconnection.

29. *Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, 477 F. Supp. 251, 256 (D. Conn. 1978), *rev'd*, 651 F.2d 76 (2d Cir. 1981).

30. *See* Notes, *supra* note 1.

31. For example, the immunity analysis in securities cases, and the deference of the Court to any administrative action or conduct claimed to be "necessary to make the securities laws work," must be understood

with reference to the grave historical crises caused by the absence of regulation in those industries. The Court has been exceptionally reluctant to allow via the antitrust laws any tampering with the regulatory framework that might threaten the recurrence of similar harm to investors. *See NASD*, 422 U.S. at 705-11; *Gordon*, 422 U.S. at 681-82; *Jacobi* v. *Bache & Co.*, 520 F.2d 1231, 1234 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976). In contrast, potential harms to the public by accommodating regulation to the policy of the antitrust laws in other industries, such as the telephone interconnection industry, has not been well demonstated. *See* TAN 32-33, pp. 11-12, & note 33, *infra*.

32. The plaintiffs in *Gordon* challenged primarily the practice of the securities exchanges and their members of using fixed rates of commission for certain kinds of sales. 422 U.S. at 661. The Court held that the challenged practices of the exchanges and their members were immune from antitrust attack. *Gordon* does not hold that whenever a federal agency has the authority to approve or prohibit conduct by a regulated entity and is engaged in detailed study of particular conduct, that conduct which occurs during the period of agency study may not be the basis for an antitrust action. Such a situation, without more, does not establish a plain repugnancy between the regulatory scheme and the antitrust laws. *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), is precisely contrary and controlling on this issue. *See also* note 31, *supra* (special characteristics of self-regulating securities industry); TAN 32-33, pp. 11-12, & note 33, *infra* (same).

It is critical here that the pre-*Carterfone* version of Tariff 263 was initiated by the carrier and not the FCC. If the original practice being studied by the agency was not undertaken by the regulated entity to comply with a directive of the agency, and there is no evidence that Congress was either aware of the particular anticompetitive practice or gave the agency specific power to authorize it, we fail to see the relevance of agency study to immunity for anticompetitive injury suffered during the period of agency review. *See also* note 38 *infra* (discussing significance of *Carterfone.)*

33. *See Silver* v. *New York Stock Exch.*, 373 U.S. 341, 349-57 (1963); *Gordon*, 422 U.S. at 660-82; *NASD*, 422 U.S. at 720-30. Justice Stewart concisely described this unusual facet of the securities industry:

> The purpose of the self-regulation provisions of the Securities Exchange Act was to delegate governmental power to working institutions which would undertake, at their own initiative, to enforce compliance with ethical as well as legal standards in a complex and changing industry. This self-initiating process of regulation can work effectively only if the process itself is allowed to operate free from a constant threat of antitrust penalties.

Silver, 373 U.S. at 371 (Stewart, J., dissenting). *See also* Note, *supra* note 1, 69 Calif. L. Rev. at 513-14.

34. The Court held the vertical restraints immune because of section 22(f) of the Investment Company Act, 15 U.S.C. § 80a-22(f)

(1976), which prohibited restrictions on the transfer of mutual fund shares except as specified in the registration statement, but in any event not "in contravention of such rules and regulations as the [SEC] may prescribe" in the public interest. At the time the lawsuit was begun, the SEC had never exercised its authority under this section to promulgate rules governing transfer of mutual funds shares, although during the lawsuit the SEC indicated it planned to exercise its regulatory authority. 422 U.S. at 718-19 n.31. The Court reasoned:

> [T]he agreements challenged in counts II-VIII are among the kinds of restrictions Congress contemplated when it enacted that section. And this conclusion necessarily leads to a determination that they are immune from liability under the Sherman Act, for we see no way to reconcile the Commission's power to authorize these restrictions with the competing mandate of the antitrust laws.

427 U.S. at 721-22.

35. The Court noted that the theory of the Government's section 1 charge in count 1 of the complaint was imprecise and obscure. 422 U.S. at 730-31. Originally the complaint seemed to attack the establishment and maintenance of the rules and the rules themselves, *id.* at 730-31 n.42; later the focus shifted to the way the defendants enforced and interpreted the rules. In any event, the practices attacked were a logical corollary to some degree of a system of rules designed to prevent a secondary market, and this ultimate goal the Court found clearly sanctioned by the Congress. There is in the case before us no analogous sanction for clearly anticompetitive behavior or for practices in aid of thereof.

The activities in *NASD* were not required or specifically authorized by any particular securities statute, but rather by an integrated scheme of self regulation overseen by the SEC. The issue presented was thus "whether the SEC's exercise of regulatory authority under [the Investment Company Act] and the Maloney Act is sufficiently pervasive to confer an implied immunity." *Id.* at 730. The Court noted that under the Maloney Act the SEC must disapprove an Association rule or change in a rule unless it is consistent with the regulatory policies of the Act, *id.* at 732, and that the SEC is authorized to require changes in the Association rules. For 35 years the SEC had, in the Court's view, approved the vertical restraints challenged in counts II-VIII. The SEC's authority to regulate the defendants' interpretation and application of these restrictive rules was just as broad as its authority over the initial promulgation of the rules. The Court reasoned: "[W]e can see no meaningful distinction between the Association's rules and the manner in which it construes and implements them. Each is equally a subject of SEC oversight." *Id.* at 733. The Court noted that Association rules were subject to careful scrutiny by the SEC, *id.* at 734, and concluded that antitrust immunity was necessary to make the regulatory scheme function.

36. *See* Hush-A-Phone, 22 F.C.C. 112 (1957) (after remand). *See also* TAN 38, p. 16, & note 38, *infra*.

37. In *Cantor*, decided after *NASD*, the Court reaffirmed that it "has consistently refused to find that regulation gave rise to an implied exemption without first determining that the exemption was necessary in order to make the regulatory Act work, 'and even then only to the minimum extent necessary.' " *Cantor*, 428 U.S. at 597 (footnote omitted) (quoting *Silver* v. *New York Stock Exch.*, 373 U.S. 341, 357 (1963)).

38. *See* note 32 *supra*. As early as 1956, the justification for restricting foreign attachments had been authoritatively construed to be limited to instances of impairment of the telephone system. *See Hush-A-Phone Corp.* v. *United States*, 238 F.2d 266, 268-69 (D.C. Cir. 1956), *after remand*, 22 F.C.C. 112 (1957). This point was reasserted in 1968 in emphatic terms, in the FCC's *Carterfone* decision which preceded the filing of the tariffs at issue here. The Commission there held that a tariff was intrinsically unreasonable if it restricted interconnection for reasons other than actual impairment of the system or its utility to users. The following language is representative of the Commission's directive that carriers be as narrowly specific in preventing interconnection and as open to customer choice and thereby the competition of foreign attachments as possible:

> [O]ur conclusion here is that a customer desiring to use an interconnecting device to improve the utility to him of both the telephone system and a private radio system should be able to do so, so long as the interconnection does not adversely affect the telephone company's operations or the telephone system's utility for others. A tariff which prevents this is unreasonable; it is also unduly discriminatory when, as here, the telephone company's own interconnecting equipment is approved for use. *The vice of the present tariff, here as in Hush-A-Phone, is that it prohibits the use of harmless as well as harmful devices.*
>
> . . . .
>
> There has been no adequate showing that nonharmful interconnection must be prohibited in order to permit the telephone company to carry out its system responsiblities. . . . *We are not holding that the telephone companies may not prevent the use of devices which actually cause harm, or that they may not set up reasonable standards to be met by interconnection devices.*
>
> . . . The telephone companies would remain free to make improvements to the telephone system and could reflect any such improvements in reasonable revised standards for nontelephone company provided devices used in connection with the system. Manufacturers and sellers of such devices would then have the responsibility of offering for sale or use only such equipment as would be in complaince with such revised standards.
>
> . . . *That the telephone companies may not have known prior to the proceedings herein that the Carterfone was in fact harmless is irrelevant, since they barred its use without regard to its effect upon the telephone system.* Furthermore, the tariff was the carrier's own. It was not prescribed by the Commission. . . .

> [W]here the carrier itself initiates the rate or practice its lawfulness remains open, not only to a prospective finding but also to a retroactive one.

Carterfone, 13 F.C.C.2d at 424-25 (emphasis added).

One further point must be added. We do not accept as significant any argument that the equipment at issue in *Carterfone* was not network control signalling equipment, whereas at least some of the equipment at issue here might be characterized as such. The rule we read in *Carterfone* is that the carriers were put on notice that tariffs might reasonably prohibit only those foreign attachments that posed a significant actual danger to the system. While a tariff might reasonably treat the connection of foreign network signalling equipment differently from the connection of other equipment that was not, this would be simply derivative of the actual danger criterion, in that the former type of equipment alone might pose such a danger. We find no significance to the distinction apart from this criterion, however.

The Commission, as well as this court, has clearly and repeatedly held that while the precise holding of *Carterfone* did not decide the issue of customer replacement of NCSU equipment, the broad and binding principle of *Carterfone*, and *Hush-A-Phone* before it, applied to *all* telephone equipment. As we said in *International Tel. & Tel. Corp.* v. *General Tel. & Elecs. Corp.* 518 F.2d 913, 933 (9th Cir. 1975):

> *Carterfone* declared void those tariffs filed with the FCC and state regulatory commissions by all domestic telephone operating companies prohibiting the interconnection of subscriber-owned equipment with the carrier's telephone system. As a result of the *Carterfone* decision, all telephone subscribers are now free, in theory, to buy their own telephone equipment from suppliers of their choice. But telephone operating companies have succeeded in minimizing the impact of *Carterfone* through tariffs requiring telephone companies to supply and install interface devices.

(Footnote and citation omitted). We are bound by our previous interpretation of *Carterfone*. *See also First Report*, 56 F.C.C.2d at 594-96 ("our *Carterfone* decision was not limited to the Carterfone device *per se*, but was rather a broad general policy. [. . .] [T]his broad *Carterfone* policy applied equally to devices which had direct electrical connections."); American Telephone and Telegraph Co.'s Proposed Tariff Revisions in Tariff No. 263 Exempting Mebane Home Telephone Co., 53 F.C.C.2d 473, 476-78 (1975) [*Mebane Home Telephone Co.*]:

> The foregoing adequately demonstrates the broad principle underlying *Hush-A-Pone* and *Carterfone*, namely, the subscriber's right to make beneficial use of an interconnected device without causing harm to the telephone company's operations. We see no reason why this broad principle should not extend to interconnected devices such as PBX's and key systems which may replace telephone system equipment. [. . .] The determining factor should be whether there is harm to the telephone network, irrespective of whether the particular interconnection device is one of the nature involved in *Carterfone* or a PBX

> system or key system. To make a distinction based solely on whether there is a substitution of telephone company equipment, would be an arbitrary and unreasonable infringement of the subscriber's right in the absence of technical harm or other public detriment.

This point was made recently by an FCC hearing examiner:

> The defendant[s'] attempt to limit the broad general policy expressed in *Hush-a-Phone* and *Carterfone* to exclude devices with direct electrical connections must be rejected. There is simply no justification for such a construction. The important and critical factor is whether the device is harmful or harmless, irrespective of whether a direct electrical connection may be involved. More specifically, there was no justification for tariffs which precluded the connection of devices by direct electrical connections which were harmless to the system.

Western States Tel. Co., FCC Docket 16883, slip op. at 58 (Initial Decision of ALJ, released April 10, 1981).

See also note 20, *supra*.

39. *See* note 38, *supra*.

40. As one student commentator has noted, "One goal implicit in implied immunity analysis is to avoid unfairly subjecting the antitrust defendant to contradictory legal standards, penalizing through the antitrust laws conduct that the regulator in some sense ordered." Note, *Antitrust and Regulated Industries: A Critique and Proposal for Reform of the Implied Immunity Doctrine*, 57 Tex. L. Rev. 751, 824 (1979).

41. Both the antitrust laws and the FCA permit the FCC and the courts to prescribe conduct, through hearings and injunctive relief, respectively, and both laws provide for damages remedies. If a utility adopts a course of conduct seeking to comply with the standards of the FCA, AT&T argues it is more likely to be held liable for treble damages under the antitrust laws; but if the utility adopts Sherman Act standards as its directive and files tariffs designed to maximize competition, AT&T suggests it may be faulted for not heeding the public interest standards of the FCA. We indicate below, however, that these concerns may be assuaged without our finding implied immunity. *See* TAN 57-67, pp. 22-30, *infra*.

42. The issue of agency approval of the post-*Carterfone* tariffs relates not so much to the policy of deference to a regulatory agency as it does to the fairness to the regulated entity. Since the district court decisions in *DASA* and *Phonetele* occurred after the FCC had declared the post-*Carterfone* tariffs unlawful, subsequently permitting an antitrust action for damages does not conflict with an agency policy. *Cf.* Note, *supra* note 40, 57 Tex. L. Rev. at 819-20 (retroactivity of *First Report* bears on issue of fairness, not on issue of conflict giving rise to immunity).

43. The majority of courts addressing the issue have concluded that the FCC did not approve the post-*Carterfone* tariffs for purposes of determining antitrust immunity. The district court in *Essential* may be interpreted to hold an opposite conclusion. *See* 446 F. Supp. at 1102, *rev'd*, 610 F.2d 1114 (3d Cir. 1979). The court concluded that "the tariffs were sanctioned as an interim means of protecting the network while the agency developed the necessary data to formulate its registration program." 446 F. Supp. at 1102.

Although the court's factual description of the agency's action may be correct, we cannot agree with its legal conclusions. We have explained our interpretation of the Commission's action on the post-*Carterfone* tariffs above. *See* notes 20 & 38, *supra*. Even if the FCC's positions during the 1968-1975 period was ambiguous in some respects, however, *see, e.g., AT&T "Foreign Attachment" Tariff Revisions*, 18 F.C.C.2d at 872 (on reconsideration), the FCC cannot reasonably be interpreted as having adopted the post-*Carterfone* tariffs as agency policy for purposes of determining antitrust immunity. *See also Northeastern*, 477 F. Supp. at 259-60.

In any event, the district court in *Essential* was reversed. *Essential Communications Sys., Inc.* v. *American Tel. & Tel. Co.*, 610 F.2d 1114 (3d Cir. 1979).

44. In a related lawsuit, the FCC has indicated that conduct which it has prescribed or explicitly approved should be entitled to antitrust immunity, but there should be no "blanket immunity" for all conduct embodied in tariffs filed with the FCC and permitted to go into effect. Memorandum of FCC as Amicus Curiae, *reprinted in* 62 F.C.C.2d 1103 (1975). *See United States* v. *American Tel. & Tel. Co.*, 427 F.Supp. 57, 59 (D.D.C. 1976).

45. By contrast, if a plaintiff sued AT&T under the Sherman Act for damages or injunctive relief based on AT&T's implementing the registration program on file with the FCC, such a suit probably would conflict with a considered policy adopted by the FCC. To allow the antitrust action to frustrate the goals of the FCA as defined by the FCC in the registration program would, in the agency's view, involve a plain repugnancy and require antitrust immunity. *Cf. Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, 555 F.2d 687, 692-93 (9th Cir. 1977) (in context of state regulation), *cert. denied in part*, 434 U.S. 1008, *vacated on other grounds*, 437 U.S. 322 (1978); *Note, supra* note 40, 57 Tex. L. Rev. at 793.

46. The Third Circuit in *Essential Communications Sys., Inc.* v. *American Tel. & Tel. Co.*, 610 F.2d 1114 (3d Cir. 1979), held in a similar case that immunity was inappropriate because the plaintiff was a competitor and not a customer of AT&T. The court concluded that the FCA was intended to protect customers of carriers against discriminatory rates and charges but was not designed to regulate the conduct of carriers vis-a-vis competitors. We have some doubt regarding the court's interpretation of the Act's history. Competitors of AT&T have initiated and participated in numerous proceedings before the FCC. *See, e.g.*, Comtronics, Inc., 57 F.C.C.2d 1202 (1976); Computoll Corp.,

56 F.C.C.2d 35 (1975); American Tel. & Tel. Co., 56 F.C.C.2d 14 (1975); United Tel. Co. of the Carolinas, 52 F.C.C.2d 717 (1975); CPI Microwave, Inc., 52 F.C.C.2d 173 (1975).

In a similar vein, several courts, on somewhat different rationales and with varying degrees of analysis, have indicated their doubt concerning the availability or effectiveness of the damages remedy when a competitor sues a regulated entity for violation of the FCA. *See, e.g., Mid Texas,* 615 F.2d at 1380 ("[T]he FCC [is not] empowered to award damages in favor of [an] injured competitor" for violation of FCA); *Nader* v. *FCC,* 520 F.2d 182, 206 (D.C. Cir. 1975) (remedial system incomplete; no damages remedy for competitors) (dicta) (by implication); *Litton Sys., Inc.* v. *American Tel. & Tel. Co.,* 487 F. Supp. 942 (S.D.N.Y. 1980) (damages remedy more useful in theory than practice); *MCI Communications Corp.* v. *AT&T,* 462 F. Supp. 1072, 1088 (N.D. Ill. 1978) (no damages remedy under FCA for injury suffered by competitor) (dicta); *United States* v. *American Tel. & Tel. Co.,* 461 F. Supp. 1314, 1328 n.43 (D.D.C. 1978); *Essential,* 446 F. Supp. at 1100-1102 (FCC's *First Report* not retroactive). *But see Phonetele,* 435 F. Supp. at 213.

Perhaps an authoritative answer to this question is on the horizon. A hearing examiner has awarded damages to a competitor of AT&T for conduct similar to that alleged here. Western States Tel. Co., FCC Docket No. 16883 (Initial Decision of ALJ, released April 13, 1981). It remains to be seen whether the Commission and the courts sustain the award.

Even if we were to accept that competitors had recourse to a remedial scheme under the FCA, and even were we further to accept that there might be different substantive standards, this would fall far short of a showing that the two remedies would be inconsistent. The law is full of instances of conduct that might give rise to two different types of liability, claims, or causes of action, and the difference is not thought synonymous with inconsistency. As even the predicates of this argument are dubious, we will not speculate at length about theoretical conflicts in a remedial vacuum.

There are two reasons for this. First, the Initial Decision in *Western States Telephone* indicates that the standard for any liability would not be inconsistent with straight antitrust analysis, though of course the damages are not trebled. *Id.* at 62-70. Second, the freedom of a party injured by anticompetitive conduct to elect between an administrative FCA remedy and a judicial cause of action under the Clayton Act is quite acceptable; the latter need not derogate or interfere with the former:

> Petitioner's failure to seek Shipping Act reparations does not affect its rights under the antitrust laws. The rights which petitioner claims under the antitrust laws are entirely collateral to those which petitioner might have sought under the Shipping Act. This does not suggest that petitioner might have sought recovery under both, but petitioner did have its choice.

Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213, 224 (1966).

47. We do note that under some interpretations of the rule of reason, the absence of a damages remedy under the FCA weighs against finding an implied antitrust immunity and gives the antitrust court a role in enforcing the public interest standards of the Act. *See Mid-Texas*, 615 F.2d at 1380.

48. A contrary interpretation might lead to the conclusion that any explicit damages remedy within a regulatory act, whether or not focused solely on antitrust violations, would give rise to antitrust immunity. We refuse, however, to rely so heavily on such a thin reed especially in light of Supreme Court precedents and the Court's repeated admonitions that repeal of the antitrust laws is not to be lightly inferred. *See, e.g., Carnation*, 383 U.S. at 224 (petitioner had option of seeking recovery under either Shipping Act or antitrust laws). It is unlikely that a plaintiff could recover damages under both statutes, *see id.*, so there is no danger of multiple liability.

49. *Cf. Cantor*, 428 U.S. at 594 ("nothing unjust in a conclusion that . . . [defendant's] participation in the decision is sufficiently significant to require that its conduct implementing the decision . . . conform to applicable federal law"); *Northeastern*, 477 F.Supp at 263 (defendant initiated challenged practice "not at the command of the state, but after exercising its own business judgment"); *United States* v. *American Tel. & Tel. Co.*, 461 F.Supp. 1314, 1327-28 (D.D.C. 1978):

> "The allegations of the complaint describe conduct that quite obviously was not stimulated by regulatory supervision or coercion; it is of a character that reflects defendants' business judgment that its profits might be maximized if potential customers were discouraged from entering the various markets AT&T controls."

50. Phonotele's complaint pleaded several matters ancillary to the tariff: It was alleged that AT&T delayed the availability of connecting arrangements for consumers outside California for over three years and charged consumers outside California over three times the monthly service charge for the same service within California without justification. Finally, Phonetele alleged that AT&T deliberately misinterpreted its own tariffs when it required a PCA for the Phonemaster. According to Phonetele, tariff 263 did not cover the Phonemaster. *See* TAN 5-6, p. 3, and notes 5 & 6, *supra*.

Regarding immunity for the ancillary conduct, the FCC may have primary jurisdiction to hear complaints concerning alleged misinterpretation or bad faith implementation of filed tariffs, but we have already concluded that this fact alone does not require implied antitrust immunity.

51. This changed after *Telerent*. *See* TAN 13-14, pp. 5-6, & notes 13, 14, 22, *supra*. Even after 1974, state commissions still retained authority to regulate the rates charged in connection with customer-

provided equipment, and one of the antitrust allegations is that General charged excessive prices, reflected in filed tariffs, in an effort to monopolize the relevant markets.

52. In this vein, the Court has already held that antitrust immunity should not be conferred when a state agency passively accepts a public utility's tariff. *See Midcal*, 445 U.S. at 104. *Cf. Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976) (implied state action). As the Court explained in *Goldfarb* v. *Virgina State Bar*, 421, U.S. 773, 791 (1975), "[i]t is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign."

53. *Cf. Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977) (state action exemption); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975) (same). This is especially the case where the entity claiming the benefit of the state action exemption is not a public corporation, such as a municipally owned utility, but is a private enterprise subject to state regulation. *See City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

54. Other courts which have refused to imply antitrust immunity under the FCA for the activities of AT&T have also held those activities, and parallel measures taken before state utilities commissions, unprotected by the *Parker* doctrine. *See, e.g., Mid-Texas*, 615 F.2d at 1380-81; *Essential*, 610 F.2d at 1125; *Litton Systems*, 487 F. Supp. at 955-57.

55. *But see Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129, 1133 (5th Cir. 1975) (rate approval by city council held sufficiently "sovereign"). Whatever degree of state sanction beyond mere authorization or approval is required by the Supreme Court's cases, *cf. Cantor*, 428 U.S. at 592-93 (state action exemption); *Goldfarb*, 421 U.S. at 790 (same), the CPUC did not adopt or embrace the PCA requirement as state policy beyond the mere fact of permitting General to file the tariff containing the PCA requirement. Thus, the first requirement of *Midcal* is not met in this case.

We do recognize a possible distinction between this case and *Cantor*, in that the CPUC's concern over the safety of the telephone network and its corresponding power to regulate the conditions of interconnection, as well as its concern with rates charged in connection with customer-provided equipment, are at the core of its regulatory concerns, *see* I P. Areeda & D. Turner, Antitrust Law ¶ 214b4 (1978), whereas provision of light bulbs in *Cantor* did not relate to the central purpose of the regulatory agency. We do not mean to suggest that *Parker* immunity never applies to tariffs initiated by the regulated entity. *See* I P. Areeda & D. Turner, *supra*, at ¶¶ 212-215. The CPUC did not, however, express its concern or exercise its power in such a way as to provide immunity for General's conduct.

Professors Areeda and Turner have concluded, albeit "reluctantly," that where there is adequate supervision and clear state intent, regulation of foreign attachments to the telephone system by state utilities commissions probably should be immune from antitrust attack. *See id.* ¶¶ 214b4 & 215b2, at 86-87, 96. This conclusion would appear to apply

equally to regulation by state commissions and also federal commissions such as the FCC. We agree with Professors Areeda and Turner on this issue, but we do not think that our holding will "render inoperable the regulatory programs of most states." *Id.* ¶ 215b2, at 96. We hold only that neither the FCC nor the CPUC intended to adopt the content of the post-*Carterfone* tariffs as federal or state policy, respectively, when they permitted the tariffs to go into effect.

56. It is possible, however, that General may be entitled to antitrust immunity on another ground. Supreme Court and lower court decisions indicate that a defendant's freedom of choice in taking the allegedly anticompetitive action is an important factor in determining whether implied regulatory immunity or immunity under the state action exemption is appropriate. *Cf. Cantor*, 428 U.S. at 592-93 (state action question), *Goldfarb*, 421 U.S. at 790. As we noted earlier in this opinion, when the facilities of an intrastate telephone company are used for interstate communications, they are subject to the tariffs filed by AT&T. To the extent General's decision to require a protective connecting arrangement was dictated by AT&T's tariff revisions filed with the FCC, its own PCA tariff may have been a justified, if not a coerced, compliance with the requirements of the federal and state regulatory schemes. *See* TAN 13-14, pp. 5-6, & note 14, *supra* (relation between federal and state regulatory schemes); TAN 57-67, pp. 22-30, *infra* (dictates of regulatory scheme under which defendant operates may be used to establish a factual defense in particular cases).

57. *International Tel. & Tel. Co.* v. *General Tel. & Elecs. Corp.*, 518 F.2d 913, 935-36 (9th Cir. 1975) (footnote omitted). *See also Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 381-82 (1973):

> We do not suggest, however, that the District Court, concluding that Otter Tail violated the antitrust laws, should be impervious to Otter Tail's assertion that compulsory interconnection or wheeling will erode its integrated system and threaten its capacity to serve adequately the public. . . . Since the District Court has made future connections subject to Commission approval and in any event has retained jurisdiction to enable the parties to apply for "necessary or appropriate" relief and presumably will give effect to the policies embodied in the Federal Power Act, we cannot say under these circumstances that it has abused its discretion."

58. The defendants might, for example, attempt to demonstrate why methods of protecting the system which did not depend on particularized knowledge about the technical specifications of all types of equipment that might be interconnected, would have been either inadequate or not reasonably foreseeable. One such method is suggested by the FCC-proposed tariff in 1975, namely the requirement that those desiring to connect foreign equipment first notify the telephone company with the provision that the telephone company could temporarily discontinue service to any customer whose equipment was causing actual harm to the telephone network. *See First Report*, 56 F.C.C.2d at 611-12.

59. Counsel for General assert that in *Carterfone* "[t]he FCC *ordered* the telephone companies to submit new tariffs [to protect the telephone system]" (emphasis added). The words of the Commission are at no point in the decision ambiguous as to this issue and simply will not bear this interpretation:

> In view of the unlawfulness of the tariff there would be no point in merely declaring it invalid as applied to the Carterfone and permitting it to continue in operation as to other interconnection devices. This would also put a clearly improper burden upon the manufacturers and users of other devices. *The appropriate remedy is to* strike the tariffs and *permit the carriers, if they so desire, to propose new tariff provisions* in accordance with this opinion. We make no rulings as to damages since that relief has not been requested. As noted above, *the carriers may submit new tariffs* which will protect the telephone system against harmful devices, *and may specify technical standards if they wish.*

Carterfone, 13 F.C.C.2d at 425-26 (footnote omitted) (emphasis added).

The *Carterfone* decision offered AT&T a choice between action and inaction. In our view, section 203 of the FCA does not require a carrier to file a tariff describing an omission to act. Even if such a statutory requirement had existed, the mere compulsion to file a descriptive tariff would not in any way have justified the filing of a restrictive tariff. The defendants do not argue that they were compelled to resist interconnection by the possibility of liability for any damage caused by uncontrolled interconnection. *See* TAN 64-65, pp. 27-28, & note 64, *infra* (discussing *Mid-Texas)*.

60. This court in *Moore* rejected a claim for immunity based on state regulation, but it is not clear from the *Moore* opinion precisely what argument the panel rejected. The briefs in that case reveal that the defendants-appellees argued only that an Oregon statute which authorized, but did not require, cemeteries to promulgate rules in very general terms could be interpreted to cover the challenged tying practices. *Moore* is distinguishable on this point because the defendants-appellees in that case offered a conjectural and wholly state law ground as a justification. Here we are dealing with a state regulation that is in many ways an appendage of the dominant federal regulatory program. We are also not permitting conclusory assertions of conjectural regulatory justification, as in *Moore*, but are only allowing an opportunity to prove a narrowly defined type of regulatory necessity as a concrete matter of fact.

Finally, we think dictum in the *Cantor* opinion, on which the *Moore* panel relied heavily, strongly supports our view. After acknowledging the severe penalty of the treble-damages provision of the antitrust laws, the Court stated:

> The concern about treble-damage liability has arguable relevance to this case in two ways. If the hazard of violating the antitrust laws were enhanced by the fact of regulation, or if a regulated company had engaged in anticompetitive conduct in

> reliance on a justified understanding that such conduct was immune from the antitrust laws, a concern with the punitive aspects of the treble-damage remedy would be appropriate. But neither of those circumstances is present in this case.

428 U.S. at 599. Thus, were the Court to encounter a case presenting a justifiable reliance on the perceived dictates of a state or federal regulatory scheme, some measure of relief from the antitrust laws would probably result. We have decided that such relief should be incorporated into the standard of antitrust liability.

61. *See, e.g., Travelers Ins. Co.* v. *Blue Cross of W. Pa.*, 361 F. Supp. 774, 780 (W.D. Pa. 1972), *aff'd*, 481 F.2d 80 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973). *Cf. International Rys. of Cent. America* v. *United Brands Co.*, 532 F.2d 231, 240 (2d Cir.) (consent decree had eliminated "monopolist's" power to control prices), *cert. denied*, 429 U.S. 835 (1976).

62. The Court found the requirement completely unjustifiable and struck it as violative of the Sherman Act mainly due to the lack of procedural safeguards accompanying the deprivation of the private wire service. 373 U.S. at 361.

Similarly, in *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602 (1974), the government challenged under section 7 of the Clayton Act a merger between two banks based on the potential competition doctrine. Noting the "extensive federal and state regulatory barriers to entry into commercial banking," the Court specifically held that "the application of the [potential competition] doctrine to commercial banking must take into account the unique federal and state regulatory restraints on entry into that line of commerce." *Id.* at 627-28 (footnote omitted).

63. The *Jacobi* case dealt with self-regulation by the New York Stock Exchange, under the Securities Exchange Act. We are aware that the *Jacobi* panel relied on *Silver*, and placed on the plaintiff the burden of showing that the challenged conduct of the regulated entity was neither "germane" to the purposes of the Securities Exchange Act nor consistent with reason. *See* 520 F.2d at 1239. The *Silver* Court, however, did not go so far as to detail what standard of proof might be applied to a proferred regulatory defense and where the burden of proof might lie. *See* 373 U.S. at 366.

While the *Silver* Court located its action under the "aegis of the rule of reason," *id.*, at 360, it also spoke of a regulatory justification "in answer to the assertion of an antitrust claim," *id.* at 361, and of the "interposing" of such a justification, *id.* at 366. Thus, although we agree with the Second Circuit's choice of a standard of reasonableness, we read *Silver* to imply that the burden of maintaining a regulatory justification lies on the defendant. We think this allocation of the burden (1) minimizes the distortion of the elements of substantive antitrust violations that would result were we to attempt to apply a "rule of reason" analysis beyond the scope of section 1 and (2) places the burden of production on the party with the best access to evidence and expertise. Accordingly, our allocation is consistent with our desire to

avoid undue interference with plaintiffs' exercise of their right to seek the protection of the "fundamental national economic policy" represented by the antitrust laws, *see National Gerimedical Hospital* v. *Blue Cross*, 49 U.S.L.W. 4672, 4676 (U.S. June 15, 1981), (quoting *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 374 (1973)), while accommodating fairness by permitting regulated entities "breathing space" between the dictates of the regulatory regime and the antitrust laws. *See Silver*, 373 U.S. at 360.

The Initial Decision in *Western States Telephone* makes a similar point:

> Contrary to the arguments of the telephone company defendants, the burden of establishing that the Western States telephones were harmful to the telephone system was on the defendants. In this connection, the Commission made clear in Docket 19528 *First Report and Order*, 56 FCC 2d 593, 596 that the *Carterfone* decision "placed the burden of proof squarely upon the carriers—not the users or this Commission—to demonstrate that a particular unit or class of customer-provided equipment would cause either technical or economic harm to the telephone network . . ." Thus, while the designation order in this case placed the burden of proof on the question of damages on Western States, the order placed the question of harm from interconnected equipment on the carrier. (See 62 FCC 2d 1070, 1071 (1977)). Hence, defendants' arguments to the contrary are rejected. It appears clear that the defendants were in the best position to establish either the presence or absence of harm arising from the Western States telephones. They had access to the information pertinent to a resolution of such question. *Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261, 284-285 (1966). *Referral of Chastain* v. *AT&T*, 49 FCC 2d 749, 751 (1974).

Western States Telephone Co., FCC Docket No. 76883, slip op. at 59-60 (Initial Desision of ALJ, released April 10, 1981).

64. Other courts have reached similar conclusions. Although the Fifth Circuit found some sort of duty to resist interconnection by other carriers if perceived not to be in the public interest, this was not based on any extensive analysis of authority, and is in any event of only tenuous relevance here as the court was interpreting a subsection of the FCA fundamentally different from that before us; interconnection of carriers is massive compared to that of most individual subscribers, and both the effects on the network and the carriers' regulatory duties may be substantially different from those involved in this appeal. *See Mid-Texas*, 615 F.2d at 1380-81. *Cf.* TAN 58-59, pp. 23, note 59, *supra* (no duty to file post-*Carterfone* tariff imposed by *Carterfone* decision).

65. The Eighth Circuit, in *Sound, Inc.* v. *American Tel. & Tel. Co.*, 631 F.2d 1324 (8th Cir. 1980), implicitly adopted a similar view when it denied a telephone company antitrust immunity and designated for fact-finding at trial the question whether the company adopted a PCA requirememt because it did not know how otherwise to protect the

integrity of its own equipment. *See id.* at 1330 n.7. The Second Circuit has made a jury question of the propriety of the design of a PCA in an antitrust case challenging the design of the PCA, but not the filing of the underlying tariff. *See Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, 651 F.2d 76 (2d Cir. 1981).

66. In *GT&E*, implied immunity was not at issue, and GT&E did not even attempt to demonstrate that the dictates of the regulatory scheme imposed on it an obligation, either actual or perceived, to acquire the telephone companies. Rather, the sole claim was grounded in the advantages gained through vertical integration, an issue irrelevant even "in the absence of any regulation whatsoever." *GT&E*, 518 F.2d at 935. Since nothing unique or peculiar to the regulatory system caused, either directly or tangentially, the defendant's conduct, there was no reason to skew the doctrinal scheme of the antitrust laws.

67. The Supreme Court apparently has taken a similar view in *National Gerimedical Hospital* v. *Blue Cross*, 49 U.S.L.W. 4672 (U.S. June 15, 1981), where, after refusing to accord Blue Cross implied antitrust immunity on the basis of its claim to have been acting to further the purposes of the National Health Planning and Resources Development Act of 1974, 42 U.S.C. § 3001, the Court noted that litigation on the merits should give attention to the "particular economic context" in which the alleged antitrust misconduct occurred. *See National Gerimedical*, 49 U.S.L.W. at 4676 n.19.

J. CLAIBORNE *(dissenting)*:

The cases of *DASA Corporation, etc.* v. *General Telephone Co. of California, et al.* (No. 77-2936) ["DASA"] and *Phonetele, Inc.* v. *American Telephone and Telegraph Co., et al.*, (No. 77-3877) ["Phonetele"] present the same issue: Is American Telephone & Telegraph Co. and its operating companies ["A.T. & T."] immune from liability under the Sherman Act (15 U.S.C. §§ 1 et. seq.) with respect to competing manufacturers of "interconnection equipment" because of the way in which they are regulated by the Federal Communications Commission ("F.C.C.")? This issue has been heavily litigated of recent, and Courts and commentators are sharply divided. See generally, Note, *AT&T and the Antitrust Law: A Strict Test for Implied Immunity*, 85 Yale L.J. 254 (1975); *Essential Communications Systems, Inc.* v. *A.T. & T.*, 446 F. Supp. 1009 (D.N.J. 1978), *revd.*, 610 F.2d 1114 (3rd Cir. 1979); *Litton Systems, Inc.* v. *A.T. & T.*, No. 76 Civ. 2512 (WCC) [in which District Judge Conner of the Southern District of New York declined to follow the 270 page recommendation of Magistrate Sinclair on this issue].

I.

Phonetele manufacturers the "Phonemaster," which is a special purpose mini-computer, designed specifically to interface with the national telephone network. Phonetele installs the Phonemaster on the customer's premises, at his/her telephone terminal. The Phonemaster then controls the amount of telephone service by restricting outgoing calls to selected area codes, exchange prefixes, and lines; it does this by electronically observing the outgoing dial signals, translating them, comparing them to a core memory, and then allowing or disallowing the call based upon the consumer's programmed restrictions. The Phonemaster, unlike the terminal, operates on 110 volt current.

DASA manufactures a telephone call diverter known as "Divert-a-Call." A call diverter can automatically transfer each

incoming telephone call at one particular number to any other designated telephone anywhere within the United States or Canada.

The nation's telephone system consists of a switch network that links the facilities of more than 1,700 cooperating telephone companies extending throughout the country. The four basic elements of this network are the terminal equipment (such as the telephone itself located on the customer's premises), the pair of wires or "loop" that connects the telephone set to the central office, the switching equipment, and the trunk facilities that connect the central offices to each other. "Network control signals" are electronic impulses which activate the devises that set up and take down connections between centers, control switches, and start and stop the equipment used for billing. Devices that generate or activate network control signals are a category of terminal equipment known as "network control signaling units," or "NCSU's." Automatic transfer devices such as "Divert-a-Call" and "Phonemaster" are NCSU's. Such devices if not carefully designed, manufactured, installed, and/or maintained, can cause improper signals to be received at the central office, thereby disrupting systems operations and message accounting.

In 1966, the F.C.C commenced its *Carterfone* proceedings with respect to A.T. & T. Tariff 132, which blanked and unqualifiedly prohibited customer-provided equipment. In 1968, the F.C.C. concluded that Tariff 132 was overbroad as applied to ancillary devices such as the Carterfone, which was not an NCSU but which merely provided a means of achieving a form of interconnection between the public toll telephone system and private mobile radio systems by acoustic and inductive coupling. *Use of the Carterfone Device in Message Telephone Service*, 13 F.C.C. 2d 420 (1968). The F.C.C. ordered the telephone companies to submit a new tariff which would protect the telephone system against harmful devices and, in response thereto, A.T. & T. submitted Tariff No. 263, which became effective on January 1, 1969. This tariff permitted acoustic and inductive connections

under specified conditions, and continued to prohibit direct electrical connection of customer-provided NCSU equipment, unless a customer wished to use indirect interconnection through a coupling arrangement furnished and maintained by the telephone company. Immediately after filing of the same, several parties filed objections thereto; however, the F.C.C. rejected these objections, holding that Tariff No. 263 was not in conflict with the prior *Carterfone* ruling. 15 F.C.C. 2d 605; 18 F.C.C. 2d 871. In its decision permitting revised tariff No. 263 to go into effect, the F.C.C stated that it would undertake an extensive study to ascertain whether any modifications or limitations on the interconnection of customer-provided NCSU equipment where necessary, desirable and technically feasible.

Accordingly, the F.C.C. commissioned a study of the whole matter of interconnection by the National Academy of Sciences (cf. 18 F.C.C. 2d 871) and ordered a Federal-State Joint Board investigation of interconnection in cooperation with the state regulatory agencies under 47 U.S.C. § 410(c) (cf. 35 F.C.C. 2d 539). Additionally, both the National Association of Regulatory Utility Commissioners ("NARUC") and at least 17 different state commissions—including California—undertook their own independent investigations of this same problem during the same period. This led to an order by the F.C.C. in which it asserted "paramount" jurisdiction over the terms and conditions governing the interconnection of all equipment used in interstate communications thereby permitting the F.C.C. effectively to limit the options available to the States in this area. *Telerent Leasing Corp.* 45 F.C.C. 2d 204, *affd., sub. nom., North Carolina Util. Comm'n.* v. *F.C.C.*, 537 F. 2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976).

Based on a Report and recommended Order of the Federal-State Joint Board and after several revisions thereof the Commission released its First Report and Order on November 7, 1975, adopting a federal registration program for the regulation of interconnection of customer-provided devices. 56 F.C.C. 2d 593.

The Commission noted that former Tariff No. 263 was one manner in which to protect the network, but concluded that the approach of that tariff was unnecessarily restrictive in view of the Commission's finding that it would be technically and administratively feasible to establish a system of equipment registration which would provide the necessary minimal protection against network harm. If so registered with the F.C.C., such equipment no longer requires a protective connecting arrangement; but if not so registered, the telephone companies may continue to require the use of a protective connecting arrangement for the interconnection of NCSU's. The federal registration program promulgated by the F.C.C. is set forth in Sub-part 68 of the F.C.C.'s regulations (47 C.F.R. §§ 68.100 et. seq.). A.T.&T. subsequently filed a revised tariff with the F.C.C. which purportedly reflects the requirements of the F.C.C.'s registration program. The new registration program will be subject to continuing review and modification by the Commission as actual experience under the program warrants. 56 F.C.C. 2d at 613.

Developments before the California Public Utilities Commission ("P.U.C.") have loosely paralleled those before the F.C.C. General Telephone tariffs filed with the P.U.C. prior to 1966 prohibited the connection of customer-provided equipment to the telephone system. In 1966, the P.U.C. found a call diverter functionally similar to the Divert-a-Call not to present any significant hazard to the telephone system and the P.U.C. ordered General Telephone to allow interconnection of that device without a connecting arrangement or to purchase and supply the device itself. DASA's predecessor-in-interest, Com-U-Trol, filed an action before the P.U.C in February of 1972, to compel General Telephone to allow interconnection of the Divert-a-Call. Although the P.U.C. ordered that General "shall permit the direct electrical connection of Divert-a-Calls to the telephone network subject to the condition that complainant shall provide reasonable assurances that quality control, installation, and repair procedures . . . necessary for the preservation of network integrity and safety will be uniformly followed," Com-U-Trol

and General were unable to come to agreement on the necessary procedures. Subsequently, on October 24, 1973, the P.U.C. commenced a general investigation into the terms and conditions of interconnection of customer-provided equipment. On April 22, 1975, the P.U.C. issued an Interim Decision, which was eventually finalized in May, 1976 and which, like the F.C.C. *First Report*, adopted a dual system of direct electrical connection of certified devices and the use of protective connecting arrangements for uncertified devices.

The Communications Act of 1934, or Title 47, Chapter 5 of the United States Code, contains the statutory scheme by which the federal government regulates wire communications. The Act specifically confers jurisdiction over "all instrumentalities, facilities, and apparatus . . . incidental to interstate communications services upon the Federal Communications Commission." 47 U.S.C. §§ 151,153(a), 153(e). Under this regulatory scheme, Appellees, like other common carrier enterprises, are required to file tariffs describing all rates and practices, including the terms and conditions for the interconnection of customer-provided equipment, before service can be offered to the public. Cf. 47 U.S.C. § 203(a). No changes can be made in the tariffs once they are filed and published, except after ninety (90) days notice to the F.C.C. and to the public (47 U.S.C. § 203(b)(1)), unless the Commission exercises its discretion and does so pursuant to 47 U.S.C. § 203(b)(2). The Commission may not prescribe a new rate or practice contained within a telephone company tariff without first granting a full opportunity for a hearing before it. 47 U.S.C. § 204(a); *A.T.&T.* v. *F.C.C.*, 487 F. 2d 865, 874 (2nd Cir. 1973). The Commission has the authority to institute an inquiry on its own motion with respect to matters raised before it (47 U.S.C. § 403), and whenever it conducts an investigation it has the duty to state its conclusions in writing (47 U.S.C. § 404). The Commission also has the power to refer any matter arising in the administration of the 1934 Act to a joint board to be composed of members from each of the states in which the wire

communication affected by or involved in the proceeding takes place or is proposed, pursuant to 47 U.S.C. § 410, which power the F.C.C. in fact exercised in the case at bar.

After such a hearing, the F.C.C. is empowered with the duty to determine what the just and reasonable charge or the just, fair and reasonable classification, regulation or practice shall be and to make cease and desist orders accordingly. In other words, if the agency concludes that the tariff is not in compliance with the Act or regulations thereunder, it must order the tariff cancelled or modified as the circumstances warrant. 47 U.S.C. § 205(a). If the agency accepts the tariff and permits it to become effective, the regulatory statutes specifically require the carriers to enforce the tariff fully and fairly unless and until it has been superseded by a new tariff filed and reviewed under this same procedure. 47 U.S.C. § 203(c).

The standard under which the F.C.C. acts in administering the Act is not the standard of "free and unfettered competition," upon which the Sherman Act is premised (cf. *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 4, 78 S. Ct. 514, 517, 2 L. Ed. 2d 545 (1958)) but a standard broader than that, namely, the standard of protecting the public interest in communications. Cf. *Scripps-Howard Radio* v. *F.C.C.*, 316 U.S. 4, 14, 62 S. Ct. 875, 882, 86 L. Ed. 1229 (1942). By this, it is meant that all charges, practices, classifications and regulations for and in connection with such communication service shall be just and reasonable. 47 U.S.C. § 201(b). Thus, antitrust considerations may be relevant to the F.C.C.'s determination of the legality of a tariff under this Chapter, but they are not determinative, except where 47 U.S.C. § 202 applies directly; other factors which the F.C.C. takes into account in determining the "public interest" include network safety and efficiency, the need of the public for reliable service at reasonable rates, the proper allocation of the rate burden in the public interest, the financial integrity of the carriers, and the future needs of both the users and carriers. Compare 62 F.C.C. 2d 997 (1977); 59 F.C.C. 2d 344 (1976); 34 F.C.C. 949

(1963); 17 F.C.C. 152 (1952); 10 F.C.C. 244 (1943); and see *Mid-Texas Communications* v. *American Tel. & Tel. Co.*, 615 F. 2d 1372, 1379 (5th Cir. 1980), and cases cited therein.

Where a common carrier violates this standard or omits to do anything which is required by the Act to be done, it can be liable to the person(s) injured thereby for damages plus attorney's fees. 47 U.S.C. § 206. Jurisdiction is in the United States District Courts or with the Commission, but not both simultaneously. 47 U.S.C. § 207. In fact, the F.C.C. currently has pending before it a reactivated proceeding involving alleged damages resulting from the post-*Carterfone* interconnection tariffs. *Western States Tel. Co.* v. *A. T. & T.*, 19 F.C.C. 2d 1068 (1969), 62 F.C.C. 2d 1170 (1977). The District Courts have jurisdiction to enforce any orders of the F.C.C. pursuant to 47 U.S.C. § 401.

III

Both appellants are relatively new businesses, having spawned in the early 1970's as a result of the post-*Carterfone* events heretofore described. Phonetele and DASA both filed their actions in 1974. The essence of Phonetele's complaint is that the defendants have conspired to limit sales of the Phonemaster by restricting the manner in which the device can be "interconnected" with the national telephone system. While the complaint does not specifically so state, Phonetele must concede as a matter judicially noticeable that the sole means by which Appellees have allegedly done so is by the filing of the tariffs heretofore described. DASA apparently alleges that General Telephone and Ford Industries, Inc. (Ford) a manufacturer of a competing call diverter for General Telephone, have conspired to eliminate competition for the production, sale and leasing of automatic call diverters; that General has filed "anticompetitive" tariffs with the P.U.C. with the purpose of eliminating and restraining competition in the field of peripheral telephone equipment; that after such tariffs were determined to be unlawful, General unnecessarily required a coupler supplied by it for the attachment of the Divert-a-Call to the telephone system; that the charges for these couplers

were unreasonable; that the couplers were designed to prevent the proper functioning of the call diverters; that General and co-conspirators sought to prevent DASA from obtaining rulings from the P.U.C. and other public bodies as to the validity of tariff provisions relating to the inter-connection of customer-provided terminal equipment; and that General conspired with Ford so that Ford would be able to control the market for call diverters.

The District Court in both cases below granted the Appellees' motion for judgment on the pleadings/motion to dismiss on the grounds that the subject of interconnection of terminal equipment with the telephone network system is impliedly immune from antitrust attack in the federal courts. *Phonetele, Inc.* v. *A.T. & T.*, 435 F. Supp. 207, 214 (C.D. Cal. 1977). These appeals follow.

A.

The starting point for any consideration of the issue at bar[1] are the well settled principles that repeal of the antitrust laws by implication is not favored and not casually to be allowed; only where there is a "plain repugnancy between the antitrust and regulatory provisions" will repeal be implied. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-351, 83 S. Ct. 1715, 1734-1735, 10 L. Ed. 2d 915 (1963), and cases cited therein. Repeal is to be regarded as implied only if necessary to make regulatory provisions work, and even then only to the maximum extent necessary. *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357, 83 S.Ct. 1246, 1257, 10 L. Ed. 2d 389 (1963).

While these principles tend to lead in the direction of the majority opinion, they cannot be considered in a vacuum. Rather, one must examine them in operation in recent Supreme Court cases, and see where this case fits within the spectrum already established by the Supreme Court. The four most recent Supreme Court opinions on the issue of implied antitrust immunity are: *Gordon* v. *New York Stock Exchange*, 422 U.S. 659, 95 S. Ct. 2598, 45 L. Ed. 463 (1975); *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 95 S. Ct.

2427, 45 L. Ed. 2d 486 (1975) ["NASD"]; *Hughes Tool Company* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 93 S. Ct. 647, 34 L. Ed. 2d 577 (1973); and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 96 S. Ct., 3110, 49 L. Ed. 2d 1141 (1976). After reading these cases and gleaning their intelligence, I believe that any Court faced with the issue at bar must ask the following questions: 1) Has Congress conferred upon the regulatory agency sufficient authority to regulate the conduct which is alleged to be anticompetitive? 2) Does the history of the regulatory agency's activities with respect to the regulation of this conduct suggest no laxity in the exercise of this authority? 3) If the federal antitrust laws were to be construed by a federal court as outlawing the regulated activity, is there reason to believe that the agency's regulation of the industry in question will no longer be able to function effectively? If a Court answers all three questions in the affirmative, then it must find implied immunity and dismiss the antitrust action.

The *Gordon* case involved an action against the New York Stock Exchange (NYSE), the American Stock Exchange (AMEX) and two member firms thereof, claiming that the system of fixed commission rates utilized by the Exchanges for the periods of time in question violated §§ 1 and 2 of the Sherman Act. The Supreme Court affirmed the dismissal of the complaint. First, the Court noted that the general policy of the Securities Exchange Act of 1934 was of self-regulation by the exchanges coupled with oversight by the Securities and Exchange Commission (S.E.C.). 422 U.S. at 666-667; 95 S. Ct. at 2603-2604. The Court then thoroughly examined the actual post-1934 experience of S.E.C.-imposed rates on the NYSE and AMEX; to summarize, the S.E.C. gradually abolished said rates between 1934 and 1975, refusing to take the position that fixed rates were required in all instances, but recognizing the established practice of minimum rates and the practicality that some level of fixed rates was necessary for a large period of time in order to insure the financial health of the brokers in question and that an immediate withdrawal of minimum rates could have disastrous

financial consequences upon the brokers as well as indirect but consequential harm to investors. The Court also noted that Congress, while expressing some dissatisfaction with the progress of the S.E.C. in implementing competitive rates, was generally content to allow the S.E.C. to proceed without new legislation. 422 U.S. at 668-682; 95 S. Ct. at 2606-2611. The Court then stated:

> . . . [T]o deny antitrust immunity with respect to commission rates would be to subject the exchanges and their members to conflicting standards. It is clear from our discussion . . . that the commission rate practices of the exchanges have been subjected to the scrutiny and approval of the S.E.C. If antitrust courts were to impose different standards or requirements, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the S.E.C. Such different standards are likely to result because the sole aim of antitrust legislation is to protect competition, whereas the S.E.C. must consider, in addition, the economic health of the investors, the exchanges, and the securities industry. Given the expertise of the S.E.C., the confidence the Congress has placed in the agency, and the active roles the S.E.C. and the Congress have taken, permitting courts throughout the country to conduct their own antitrust proceedings would conflict with the regulatory scheme authorized by Congress rather than supplement the scheme.

422 U.S. at 689-690; 95 S. Ct. at 2614-2615.

The *NASD* case involved, *inter-alia*, an alleged conspiracy and horizontal combination among NASD's members to prevent the growth of a secondary dealer market in the purchase and sale of mutual-fund shares.[2] Section 22(f) of the Investment Company Act of 1940 authorizes mutual funds to impose restrictions on the negotiability and transferability of shares, provided they conform with the fund's registration statement and do not contravene any

rules and regulations that the S.E.C. may prescribe in the interests of the holders of the outstanding securities. Section 22(d) provides that no dealer shall sell mutual fund shares to any person except a dealer, a principal underwriter, or the issuer, except at a current public offering price described in the prospectus. The Maloney Act of 1938 (§ 15A of the Securities Exchange Act of 1934) supplements the S.E.C.'s regulation of over-the-counter markets by providing a system of cooperative self-regulation through voluntary associations of brokers and dealers. In affirming the dismissal of the complaint as to Count I, the Supreme Court held that where Count I alleged activities which were neither required by Section 22(d) nor authorized by Section 22(f), but where the S.E.C.'s supervisory powers over the NASD is extensive, and weighs competitive concerns as a factor in regulating the secondary market of mutual funds shares purchases and sales, Count I is immune from antitrust liability. 422 U.S. at 730-733; 95 S. Ct. at 2428-2429. In particular, the Court stated:

> There can be little question that the broad regulatory authority conferred upon the S.E.C. by the Maloney and Investment Company Acts enables it to monitor the activities questioned in Count I, and the history of Commission regulations suggests no laxity in the exercise of this authority. To the extent that any of appellees' ancillary activities frustrate the S.E.C.'s regulatory objectives it has ample authority to eliminate them.
>
> Here implied repeal of the antitrust laws is necessary to make the regulatory scheme work. [cite] In generally similar situations, we have implied immunity in particular and discrete instances to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws. [cites] In this instance, maintenance of an antitrust action for activities so directly related to the S.E.C.'s responsibilities poses a substantial danger that appellees would be subjected to

> duplicative and inconsistent standards. This is hardly a result that Congress would have mandated. We therefore holed that with respect to the activities challenged in Count I of the complaint, the Sherman Act has been displaced by the pervasive regulatory scheme established by the Maloney and Investment Company Acts.

422 U.S. at 734-735; 95 S. Ct. at 2450.

In *TWA*, the appellee brought an antitrust action against Hughes Tool Co. (Toolco) and others under the Sherman Act as a result of the manner in which Toolco had exercised its controlling interest in TWA, with particular reference to Toolco's asserted acts to control and dictate the acquisition and financing of aircraft by TWA. As an organization engaged in phases of aeronautics, Toolco could not acquire control of an air carrier such as TWA without consent of the Civil Aeronautics Board (C.A.B.). In 1944, the C.A.B. approved de facto control of TWA by Toolco as comporting with the provision of § 408 of the Federal Aviation Act. That provision permits acquisitions of control that the C.A.B. finds are not inconsistent with the public interest and that will not result in monopoly. Section 415 of the Act endows the C.A.B. with the power to supervise all transactions between carriers and their owners on a continuing basis. And, Section 414 immunizes any conduct approved by a C.A.B. order issued under § 408 from antitrust liability. The C.A.B., after full hearings into the Toolco-TWA relationship, found that Toolco's financial and other support was of great importance to TWA and concluded that the continued interest of Toolco in TWA appears to be essential to the best interests of the carrier and the public. The C.A.B.'s approval was made subject to the conditions of the 1944 order. As a result, from 1944 to 1960, every acquisition and lease of aircraft by TWA from Toolco and each financing by TWA from Toolco received C.A.B. approval pursuant to § 408.

The Supreme Court reversed a default judgment in favor of TWA, holding that the conduct of Toolco was impliedly immune from the sanctions of the antitrust laws. Appellants herein seek

to distinguish this case and the case upon which the Supreme Court based its ruling in *TWA, Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 83 S. Ct. 476, 9 L. Ed. 2d 325 (1963), on the basis that the Communications Act of 1934 does not have provisions similar to Sections 408 and 414 of the Federal Aviation Act. While this fact is true, the distinction is without a difference since it is clear that the *TWA* Court did not base its holding or restrict its holding to a strict interpretation of those two sections. Rather, the Court stated:

> Competition and monopoly—two ingredients of the antitrust laws—are thus standards governing the CAB's exercise of authority in granting, allowing, or expanding or contracting the control which Toolco had over TWA by reason of the various orders issued by the CAB under § 408. In this context, the authority of the Board to grant the power to "control" and to investigate and alter the manner in which that "control" is exercised leads us to conclude that this phase of CAB jurisdiction . . . preempts the antitrust field.

409 U.S. at 385; 93 S. Ct. at 659-660.

> We repeat, however, what we said in the *Pan American* case that the Federal Aviation Act does not completely displace the antitrust laws . . . One of the most conspicuous exceptions would be the combination or agreement between two air carriers involving trade restraints. [cite] There may be other exceptions. But where, as here, the CAB authorizes control of an air carrier to be acquired by another person or corporation, and where it specifically authorizes as in the public interest specific transactions between the parent and the subsidiary, the way in which that control is exercised in those precise situations is under the surveillance of the CAB, not in the hands of those who can invoke the sanctions of the antitrust laws.

409 U.S. at 387, 93 S. Ct. at 661.

Finally, in *Cantor*, the respondent, a private utility which was the sole supplier of electricity in southeastern Michigan, also furnished its residential customers, without additional charge, with almost 50% of the most frequently used standard-sized light bulbs under a longstanding practice antedating state regulation of electric utilities. This marketing practice for light bulbs is approved, as part of respondent's rate structure, by the Michigan Public Service Commission, and may not be changed unless and until respondent files, and the Commission approves, a new tariff. The Supreme Court held that the respondent's marketing practice was not immune from antitrust liability, stating:

> Michigan's regulatory scheme does not conflict with federal antitrust policy and, conversely, if the federal antitrust laws should be construed to outlaw respondent's light bulb-exchange program, there is no reason to believe that Michigan's regulation of its electric utilities will no longer be able to function effectively. Regardless of the outcome of this case, Michigan's interest in regulating its utilities' distribution of electricity will be almost entirely unimpaired. We conclude that neither Michigan's approval of the tariff filed by respondent, nor the fact that the lamp-exchange program may not be terminated until a new tariff is filed, is a sufficient basis for implying an exemption from the federal antitrust laws for that program.

428 U.S. at 598; 96 S. Ct. at 3121.

With these four cases, the statutory scheme and the activity of the F.C.C. in regulating the interconnect industry in mind, it is readily apparent to me that the three aforementioned questions must be answered in the affirmative. On this basis, then, I respectfully dissent.

As to the first question, Congress has given the power to private individuals to sue A.T. & T. and its operating companies for damages where it implements a tariff which constitutes an unjust

or unreasonable practice. As heretofore stated, the standard of "unjust and unreasonable" can include but is not necessarily restricted to anticompetitive practices.

As to the second question, it is clear that the F.C.C. has taken an active interest in regulating the entire field of interconnection, to the point of preempting the state public utility/service commissions in this regard. And, after seven years of concentrated study, it has adopted a "middle ground." That is to say, it has neither adopted A.T. & T.'s position of totally restricted competition nor Appellants' position of totally unfettered competition, but a registration program which is designed to protect the companies with sound interconnection products against the tariff practices of A.T. & T. and simultaneously to protect A.T. & T. and the public from companies with unsound interconnection products.

As to the third question, since the Court is to deal in theoretical possibility, I must conclude that circumstances could exist whereby the judgment of a federal court would disenable the F.C.C. to function effectively in this particular field of regulation. If I assume for the time being that Phonemaster's requirement of 110-volt current to operate must require a coupling arrangement which requires A.T. & T. engineering expertise, and if I assume for the time being that Divert-a-Call is or will become a hazard to the network system and cause both annoyances to the customers and disruption to A.T. & T.'s billing procedures, then it becomes obvious that the F.C.C. should have the power to prevent or restrict Appellants' ability to compete in the marketplace; the public interest would require no less. However, anticompetitive practices on the part of A.T. & T. could constitute *per se* violations of the Sherman Act and thereby require that Appellants be allowed to compete and A.T. & T. pay treble damages. Of course, these assumptions may well prove to be totally without foundation in time. However, the point is clear: this is not a case of a public utility commission whose legislative mandate clearly has nothing to do with the regulation of the light bulb sales industry, as in *Cantor*. The F.C.C. is to act in the public interest

in the regulation of the communications industry, and the history surrounding this action indicates that the F.C.C. has deemed the public interest in the interconnect industry to be vital. Whether wisely or not, it has formulated a plan by which to regulate that industry, and an antitrust judgment could well indeed make a mockery of that plan.

B

I am aware that in urging the affirmance of the Courts below I would create a conflict, in that the Third Circuit in *Essential, supra,* faced with the same precise issue and the same operating facts, held that A.T. & T. and its operating companies could not be shielded impliedly from antitrust immunity. After studying that opinion, however, and with all due respect for the Third Circuit, I simply find it to be unpersuasive, especially in light of *Gordon* and *NASD* and the total lack of attention which the *Essential* Court gave to those two cases.

In arriving at its holding, the *Essential* Court drew a distinction between a customer for communications services and a competitor for communications services. The Court reasoned that the F.C.C. has the primary responsibility to insure that enforcement of the common carrier's duty to offer service to all who seek it on reasonable terms and conditions, but the federal courts, not the F.C.C., has the primary responsibility for the enforcement of antitrust laws which implies the permission of potential competitors in communications services to have access to the Bell System network. 610 F. 2d at 1122.

It is difficult to glean the authority from which the *Essential* Court derived that distinction; most certainly, it did not derive the distinction from the *NASD* and *Gordon* cases, which involved alleged restrictions of competitors of the regulated industries in question and nonetheless found implied antitrust immunity to exist. It appears from the *Essential* opinion that that Court derived the distinction from some dictum in *Keogh* v. *Chicago &*

Northwestern Ry. Co., 260 U.S. 156, 161-163, 43 S. Ct. 47, 49-50, 67 L. Ed. 183 (1922), involving an action against a shipper who had filed tariffs with the I.C.C. by a customer.

In this regard the *Essential* Court plainly misread *Keogh*, as that case had nothing to do with the doctrine of implied antitrust immunity. The holding of *Keogh* is that a railroad shipper may not bring an action under 15 U.S.C. § 15 for rebate of rates found by the I.C.C. to be reasonable and nondiscriminatory and fixed accordingly; this holding is clearly a resolution of a conflict between the Interstate Commerce Act and the Clayton Act. Cf. 260 U.S. at 162-163, 43 S. Ct. at 49. The *Keogh* Court did say, though, that under 15 U.S.C. §§ 1 et. seq. a combination of carriers to fix reasonable and nondiscriminatory rates may be illegal, and this would be actionable under the antitrust laws. Cf. 260 U.S. at 161-162; 43 S. Ct. at 49.

I do not think that an "implied immunity distinction" can be read into *Keogh*, since that case dealt not with the pervasive regulation of a regulatory agency with broad powers, as here, but statutory construction with respect to specifically defined powers of a regulatory agency. To the extent that I am wrong in that regard, however, it is correct to say that the Supreme Court rendered the "*Keogh* distinction" meaningless ten years later in *United States Navigation Co., Inc.* v. *Cunard S. S. Co., Inc.*, 284 U.S. 474, 52 S. Ct. 247, 76 L. Ed. 408 (1932). *Cunard* involved an antitrust action against shippers who allegedly conspired to fix general tariff rates and establish lower contract rates for shipping among the general members with the intent of driving the plaintiff, a competitor, out of business. In other words, in the lingo of the *Essential* Court, this action involved not customers of a regulated industry, but competitors. Nonetheless, the Supreme Court affirmed the dismissal of the action. Noting that this matter as well lay within the jurisdiction of the I.C.C. under the Shipping Act (49 U.S.C. §§ 801 et. seq.), the *Cunard* Court actually extended, as opposed to distinguished the *Keogh* opinion as follows:

> A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions, or are so interrelated with such charges as to be, in effect, a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws. Compare *Keogh* v. *C & N. W. Ry. Co.* [cite omitted]. The matter therefore is within the exclusive preliminary jurisdiction of the Shipping Board. The scope and evident purpose of the Shipping Act, as in the case of the Interstate Commerce Act, is demonstrative of this conclusion . . . .

284 U.S. at 485; 52 S. Ct. at 250-251. See also *far East Conference* v. *United States*, 342 U.S. 570, 72 S. Ct. 492, 96 L. Ed. 576 (1952).

While that was the holding of the *Essential* Court, three other factors appeared to play a part in that Court's *ratio decidendi:* first, that nothing in the 1934 Act explicitly directs the F.C.C. when exercising its authority to take into account antitrust considerations (610 F. 2d at 1120); second, the statutory scheme also includes a "savings clause, Section 414, which, combined with 47 U.S.C. § 221(a), conferring express immunity from antitrust litigation in a situation not applicable herein, demonstrates that no blanket immunity from antitrust law was intended by Congress (610 F. 2d at 1120); and third, that in the *Essential* Court's opinion, the fact that the F.C.C. suspended its judgment on the question of interconnection did not rise to the level of agency activity requiring a finding of implied immunity (610 F. 2d at 1124).

The first and the third factors fly in the face of the *Gordon* and the *NASD* opinions. Neither statutory scheme in those cases involved a specific statute which required the S.E.C. to consider competitive considerations in regulating the broker-dealers in question; yet, the Supreme Court demonstrated that the history

and practice of that regulatory agency was to consider that factor, along with other factors, in determining the public interest. So it is here. And, the F.C.C. suspended its judgment with respect to the enormous problem of interconnection for a period of time exceeded by the S.E.C.'s suspension of its judgment pending further study and review in *Gordon;* yet, all nine justices of the *Gordon* Court were satisfied that the S.E.C. was active enough in the regulation of broker commission rates to find implied immunity therein.

The second factor states the key argument presented by Appellant Phonetele and the United States, appearing as *amicus curiae,* 47 U.S.C. § 221(a), or the Willis-Graham Act, grants the F.C.C. the exclusive right to consolidate telephone companies or allow existing companies to acquire the whole or part of another, free from any potentially or actually conflicting Acts of Congress. 47 U.S.C. § 414 states that "nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute but the provisions of this chapter are in addition to such remedies." From these two statutes the argument is that Congress clearly expressed its intent that A.T. & T. be subject to antitrust remedies, except in the limited situation of Section 221(a); and since Section 221(a) clearly has no application to this lawsuit, Appellees must be subject to potential treble damages under the Sherman Act.

The existence of the saving clause does not alter the well-settled principle that persons such as the Appellant must exhaust their administrative remedies prior to bringing an action in a court of law. *United States Navigation Co.* v. *Cunard S. S. Co., supra,* 284 U.S. at 485-486, 52 S. Ct. at 251, and cases cited therein. And, in the field of antitrust litigation, dismissal of antitrust suit, where an administrative remedy has superseded the judicial one, is the usual course. *Pan American World Airways, Inc.* v. *United States, supra,* 317 U.S. at 313, n. 19; 83 S. Ct. at 486-487, n. 19, and cases cited therein. Thus, the existence of the saving clause

has no effect upon the doctrine of implied immunity. See also *Pan American World Airways, Inc., supra,* 317 U.S. at 321, 83 S. Ct. at 490 (J. BRENNAN, Dissenting).

More fundamentally, this Court rejected the argument presented based upon Section 221(a) five years ago in the case of *International T. & T. Corp.* v. *General T. & E. Corp.*, 518 F. 2d 913 (9th Cir. 1975). That case involved an antitrust action brought by I. T. & T. against G. T. & E., alleging that G.T. & E.'s acquisitions of 33 telephone operating companies had enabled it to effect a growing foreclosure of competition within the telecommunications equipment-manufacturing industry. In dictum the Court stated:

> . . . The availability of a statutory exemption upon application to the FCC greatly reduces the danger of collision between the "two regimes . . ." and even if a statutory exemption is not obtained [under 47 U.S.C. § 221(a)] or is not available a defendant can make a claim of implied immunity which will be tested under the "repugnancy" standards of *Philadelphia National Bank [supra]* and its successors, thus insuring that the policies of the regulatory statute will not be thwarted.

518 F. 2d at 918-919. There are two circumstances in which a court may look beyond the express language of a statute in order to give force to Congressional intent: where the statutory language is ambiguous; and where a literal interpretation would thwart the purpose of the overall statutory scheme or lead to an absurd result. *International T. & T. Corp.* v. *General T. & E. Corp., supra* at 917-918, and cases cited therein. In this case, if one were to interpret Section 221(a) to mean that that was the only instance in which telephone companies were immune from antitrust litigation, such an interpretation would thwart the purpose of the overall statutory scheme. If the F.C.C. had no power to consider the anticompetitive acts of the common carriers under its jurisdiction, the result might well be different. But, it is

undisputed that the F.C.C.'s powers are very broad and its mandate to protect the public interest includes the power to consider such anticompetitive acts which, in the case of the interconnect industry, it has done. And, as is evident from the decisions of the F.C.C. heretofore cited, the F.C.C. does not and cannot consider itself bound exclusively by principles of competition in protecting the public interest.

I cannot agree with the majority's decision to remand. The majority states:

> We thus recognize that those considerations advanced in favor of implied immunity, while not providing a blanket exemption, do bear on the case in a limited way. The logic of complying with a regulatory mandate is relevant as an antitrust defense, but the same logic has internal limits which do not justify any and all acts ostensibly taken in response to the FCA. There is no absolute antitrust immunity or exemption by virtue of federal or state law in this case, but the defendants below may offer to show that their actions were justified by the constraints of the regulatory schemes in which they operated.

These were the issues squarely before the trial judge and decided by him in an eloquent and brilliant decision. It defies logic to remand issues already heard and decided.

I recognize that this dissent is authored in a time in which it is politically fashionable to criticize regulatory agencies for their very existence and to criticize the telephone companies for their very existence as a monopoly. Nonetheless, we are first and foremost a nation of laws and the principle of *stare decisis* is the single most important key to the cohesiveness of our society. After examining the principles of law in the factual settings of *Gordon* and *NASD*, and after examining the extent to which the F.C.C. has attempted to regulate the interconnection industry, I find it inconceivable to do anything but affirm. Therefore, I respectfully dissent.

FOOTNOTES

1. At oral argument we requested supplemental briefs on the issue of whether the activities of Appellees were immune from antitrust litigation due to state regulation under the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943) and its progeny. Upon reconsideration, this case is inappropriate for a consideration of that issue. First of all, it was not raised to either Court below. Secondly, the F.C.C. in its *Telerent* decision effectively preempted the states from regulating the area of the interconnection industry; to the extent that the states regulate at all, at least with respect to the California P.U.C., it is in a manner perfectly consistent with the F.C.C. registration program of 47 C.F.R. §§ 68.100 et. seq. See *Phonetele, Inc.* v. *American Telephone & Telegraph*, 435 F. Supp. at 213, n. 12.

2. For the sake of brevity discussion of the alleged vertical conspiracy and Counts II-VIII of that complaint is omitted here.

Appendix B

A-68

(Filed March 15, 1982)

Order

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 77-3877
77-2936

PHONETELE, INC.,
Plaintiff-Appellant,

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INCORPORATED;
BELL TELEPHONE LABORATORIES, INCORPORATED,
Defendants-Appellees.

DASA CORPORATION, ETC.,
Appellant,

vs.

GENERAL TELEPHONE COMPANY OF CALIFORNIA, *et. al.*,
Appellees.

Before: KENNEDY and FLETCHER, Circuit Judges, and CLAIBORNE,* District Judge.

The opinion is amended as follows. The sentence in the text which begins in the right hand column at page 6269 of the slip opinion carries over to 6270 (beginning "At this stage") is stricken, and the following sentence is inserted in place:

> At this stage of the proceedings, it appears this inquiry will depend largely on whether the facts show the companies did reasonably conclude, given their expertise, that uncontrolled NCSU interconnection would endanger their own equipment or disrupt their own signal transmissions in identifiable ways, and also that the tariff as filed was a reasonable, properly focused mechanism, considering other alternatives then available, to prevent such real harm from occurring.[58]

* Honorable Harry E. Claiborne, Chief Judge, United States District Judge for the District of Nevada, sitting by designation.

Appendix C

A-69

(Filed July 26, 1977)

Memorandum of Decision

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 74-3566-WPG

PHONETELE, INC.,

Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INCORPORATED; BELL TELEPHONE LABORATORIES, INCORPORATED,

Defendants.

Phonetele, Inc. filed this antitrust suit against American Telephone and Telegraph, Inc. (AT&T), Western Electric Co., Inc. and Bell Telephone Laboratories, Inc., charging violations of the Sherman (15 U.S.C.A. §§ 1, 2 (Supp. 1977)) and Clayton (15 U.S.C. § 14 (1970)) Antitrust Acts. Phonetele alleges that the violations grew out of various tariffs that AT&T filed with the Federal Communications Commission (FCC) and which, the plaintiff contends, had the effect of impeding Phonetele's sales in the telecommunications marketplace.

Phonetele manufactures a device called a "Phonemaster," which is an electronic device designed to be linked to the national telephone network. Once attached to a telephone instrument, the Phonemaster prevents outgoing calls to telephones that are not in pre-selected area codes or exchanges. Thus, it can bar the completion of unauthorized or misdialed long distance calls, which in turn can result in considerable savings to telephone subscribers.

The essence of Phonetele's complaint is that the defendants have conspired to limit sales of the Phonemaster by restricting the manner in which the device can be "interconnected" with the national telephone system. Prior to 1968, tariffs[1] filed by AT&T

with the FCC prohibited the interconnection of customer-provided equipment with the national telephone network. However, this practice was invalidated by the FCC in *Carterfone*, 13 F.C.C. 2d 420, *reconsideration denied* 14 F.C.C. 2d 571 (1968). Following that decision, AT&T filed a tariff[2] that permitted interconnection so long as AT&T hardware was used to form the linkage between the Phonemaster and the telephone network. The tariff also required the customer to pay AT&T an installation charge and a monthly service fee for the interconnecting equipment. This is the tariff that is challenged in this action.

The defendants respond that they are immune from antitrust liability because this aspect of the telecommunications industry is pervasively regulated by the FCC and its counterpart agencies at the state level. They argue that when Congress mandated an extensive federal regulatory system over telecommunications by passing the Communications Act of 1934 (47 U.S.C. §§ 151-609) (the "Communications Act" or the "Act"), it simultaneously effected an implicit repeal of the federal antitrust laws to the extent that they were repugnant to the regulatory program. Accordingly, the defendants have moved for judgment on the pleadings, arguing that this case should be dismissed because the regulatory scheme and the antitrust laws do not permit of mutually harmonious application. This court took the matter under submission, and now grants the motion.

I

Antitrust Immunity

The goals of regulatory laws and antitrust statutes often are in conflict. *See FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953). The former usually are predicated on the assumption that unrestrained interaction of competitive forces in a particular industry will disserve the public interest; while the latter are founded upon the premise that such unrestrained interaction will yield the best allocation of economic resources. 2 A. Kahn, *The Economics of Regulation: Principles and Institutions* 1, 4-5 (1971). *Pan American World Airways, Inc.* v. *United States*,

371 U.S. 296, 301 (1963). In certain instances, Congress has recognized that antitrust enforcement would clash so severely with the goals of a newly minted regulatory program that an express partial repeal of the antitrust laws has been made a part of the regulatory statute.[3] However, in some instances where Congress has not specifically provided for repeal, the Supreme Court has held that the antitrust and regulatory statutes are so mutually inconsistent that a partial repeal of the antitrust laws should be inferred to the extent necessary to vindicate the regulatory scheme. *E.g., Pan American World Airways, Inc.* v. *United States, supra; United States* v. *Association of Securities Dealers,* 422 U.S. 694 (1975).

The Supreme Court has laid down some guidelines for applying the doctrine of such implied immunity. Thus, implicit repeals are "strongly disfavored," *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350 (1963); should be found only "in cases of plain repugnancy between the antitrust and regulatory provisions," *id.*; "and then only *pro tanto* to the extent of the repugnancy." *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 456 (1945). In short, repeal should be inferred only where necessary to make the regulatory program work. *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963).

II

The Regulatory Program

An analytical starting point for a determination of whether antitrust principles are repugnant to the FCC's regulation of the interconnection of customer-owned devices with the national telephone network ("interconnection"), is a consideration of the nature of the regulatory program established by Congress. The legislative history of the Communications Act is silent on the subject of immunity.[4] However, it indicates that the FCC is to have "comprehensive jurisdiction over the [telecommunications] industry."[5] The FCC is to exercise this jurisdiction over common carriers, like AT&T, which are to make available a rapid, efficient

and adequate national communications system with service pursuant to "just and reasonable" tariffs initiated by the carriers. (§ 201(b)). In addition, the Act proscribes conduct by carriers that constitutes unjust or unreasonable discrimination in providing service (§ 202), and requires them to furnish such service "upon reasonable request therefor." (§ 201(a)).

In order to effect these goals, the Act requires a common carrier to file "schedules" (tariffs) with the FCC, setting forth the manner in which the carrier plans to operate its communications service. (§ 203(a)). No carrier may engage in business unless tariffs have been filed (§ 203(c)), nor may a carrier deviate from the tariffs unless they are properly amended. (§ 203(b)(1)). The FCC may pass on the lawfulness of tariffs by holding hearings to determine whether the tariffs are "just and reasonable" (§§ 204-205) or "in violation of any of the provisions of the [Act]." (§ 205). Hearings are commenced either upon the initiative of the FCC or upon complaints filed by interested parties. (§§ 204, 208). If, after a hearing, the Commission finds that a tariff is unlawful, it may modify it. (§ 203(b)(2)).

The FCC is also obliged to keep itself informed as to "technical developments and improvements" in the telecommunications field, so that "the benefits of new inventions and developments may be made available to the people of the United States." (§ 218). Finally, the FCC is empowered to "make such rules and regulations . . . as may be necessary in the execution of its functions" (§ 154(i)), and "as may be necessary in the public interest to carry out the provisions of [the Act]." (§ 201(b)). This "public interest" compass should guide the Commission's determination of whether a carrier-initiated tariff is "just and reasonable" (§ 201(b)) and whether, pursuant to § 205, it conforms to the general policies set forth in § 151, namely, to make available a rapid and efficient telephone system.

Although competition is a relevant component of the "public interest" it is not determinative.[6] Rather, the FCC is to measure the salutary effect that competition will have upon the quality of

telecommunications service provided to the public. As Justice Frankfurter stated in *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 97 (1953):

> "[T]he Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it. . . . Merely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as this one, is not enough."

The FCC has expressed its awareness that the antitrust goals of encouraging free competition are not necessarily in harmony with the public interest standard that must govern its regulatory function.[7]

It is within the hereinabove described statutory system that the FCC has regulated interconnections. Prior to 1968, the tariff that AT&T had on file with the FCC flatly prohibited interconnection. Tariff F.C.C. No. 132, (filed April 16 1957), superseded by tariff F.C.C. No. 263, (filed January 2, 1968). In *Carterfone*, 13 F.C.C. 2d 420, *reconsideration denied* 14 F.C.C. 2d 571 (1968), the FCC determined that such tariff was unreasonable and unlawful within the terms of § 201(b), and called upon carriers to submit new tariffs that would permit interconnection but would not "adversely affect the telephone company's operations or the telephone system's utility for others." 13 F.C.C. 2d at 424, 14 F.C.C. 2d at 573. The carriers responded in 1968 by filing new tariffs that permitted interconnection through carrier-supplied connecting arrangements, and in conjunction with carrier testing of customer-supplied equipment. The FCC was uncertain that this method was the minimum protection required to preserve the integrity of the telephone network at the lowest cost, but "exercising an abundance of caution in protecting the telephone network from possible harm allowed the tariffs to become effective[8] without ruling explicitly on their lawfulness." 40 Fed. Reg. 53013, 53014 (1975).

Between 1969 and 1972, the FCC conducted informal proceedings to assist in its evaluation of the public interest factors involved in liberalizing interconnection rules without compromising the efficiency of the national telephone network. The Commission issued technical research contracts to study the effects of interconnection and solicited comments from interested parties. *Id.* On June 14, 1972, the FCC instituted a Proposed Rule-Making aimed at determining the best approach to interconnection. 35 F.C.C. 2d 539 (1972). These proceedings remained active during 1973 and 1974 when comments were solicited about various proposals for systematic regulation of interconnection. 40 F.C.C. 2d 315 (1973). On November 14, 1975, after giving full and complete consideration to many suggested regulatory programs, the FCC proposed a "Registration Program" for customer-owned equipment. 40 Fed. Reg. 53013 (1975) (codified in 47 C.F.R. § 68 (1976)). Basically the program allows users to interconnect their equipment if it is attached through protective circuitry registered with the FCC or if the equipment itself is so registered. The FCC will not register a device that it concludes will present potential harm to the overall quality or safety of the national telephone network. Non-registered equipment may be attached with telephone company interface devices. The Commission's program was recently upheld by the Fourth Circuit. *North Carolina Utilities Commission* v. *FCC*, No. 76-1002 (4th Cir. March 22, 1977).

III

Application of Antitrust Immunity Theory

It appears evident from the foregoing that if the federal antitrust laws are applied to the interconnection of customer-owned telecommunications devices, the sophisticated regulatory program of the FCC will not work. These two statutory concepts are sufficiently mutually repugnant to compel the inference that Congress intended to repeal the antitrust laws otherwise applicable to the area of interconnection.[9]

This conclusion is consistent with prior Supreme Court decisions about implied immunity, because four factors that the Court found relevant in those cases are present here.[10] First, the acts charged in this civil suit as antitrust violations involve the "precise ingredients" of the regulatory authority vested in the FCC. *See Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 305 (1963). As the earlier discussion in this memorandum shows, Sections 201-218 of the Communications Act mandate that the Commission regularly monitor tariffs and terminate unlawful ones. The promulgation and implementation of tariffs is the principal conduct about which Phonetele complains.[11] Moreover, the previously described Registration Program (47 C.F.R. § 68 (1976)), shows that the Commission has maintained tight control over interconnection.[12]

Second, like the regulatory agencies involved in *Pan American*, 371 U.S. at 311-12, and *United States* v. *National Association of Securities Dealers*, 422 U.S. 694, 734 (1975), the FCC has authority to grant the relief sought in the complaint. Since the Commission can issue cease and desist orders (§ 205(a)) and modify carrier-initiated tariffs (§ 203(b)(2)), it can provide the injunctive relief that Phonetele desires. Pursuant to Sections 206-209 of the Act, the FCC can also award damages to Phonetele. *See Western States Telephone Co.* v. *American Telephone and Telegraph Co.*, 19 F.C.C. 2d 1068 (1969). *See also Booth* v. *American Telephone and Telegraph Co.*, 253 F.2d 57, 58 (7th Cir. 1958). And assuming, *arguendo*, that Phonetele has standing to seek a rebate for one of its customers, it may apply for such relief from the FCC. (§ 204(a)).

Third, competition is a component of the public interest standard that guides the Commission's regulation of interconnection.[13] The Court's decisions in *Pan American, Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975), and *United States* v. *National Association of Securities Dealers*, 422 U.S. 694 (1975) indicate that implied immunity is logical when, in formulating its regulatory policy, the agency includes a consideration of the beneficial purposes of preserving competition.

Fourth, the FCC has considerable expertise in the field of interconnection, to which courts have deferred, *e.g.*, *Carter* v. *American Telephone and Telegraph Co.*, 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967). The Supreme Court has suggested that agency expertise supports a finding of implied immunity. *Gordon*, 422 U.S. at 689-90. In light of the complex electrical engineering questions presented by interconnection, inferred antitrust immunity, and thus deference to the FCC, are reasonable. This will prevent the application of conflicting statutory standards to the defendants and will thereby protect the integrity of the regulatory program that Congress established in the Communications Act. To hold otherwise would be to sanction the collision of the policies of the Antitrust and Communications Acts, a result that plainly would disserve the goals of both.

In reaching this conclusion, it is heartening to note that my brother Judge Lydick rendered a similar decision involving another device that is interconnected to the national telephone network. *DASA Corporation* v. *General Telephone Co. of California*, No. CV 73-2511-LTL (C.D. Cal. May 10, 1977).

For the reasons hereinabove set forth the defendants' motion is granted.

DATED: July 25, 1977.

/s/ WILLIAM P. GRAY

William P. Gray
United States District Court

FOOTNOTES

1. As part of the regulatory regime established by the Communications Act of 1934, 47 U.S.C. §§ 151-609, AT&T is required to submit "schedules" to the FCC showing all charges between points on its system. (§203(a)). These schedules are called "tariffs." The regulatory framework established by the Communications Act is considered in Part II, *infra*.

2. Revised tariff F.C.C. No. 263, filed October 22, 1968.

3. *E.g.*, 47 U.S.C. § 221(a) (1970) (providing that consolidations of formerly independent telephone companies, once approved by the FCC, are not subject to the antitrust laws.) Phonetele argues that this express grant of immunity in the very statute upon which AT&T relies for its implied immunity claim bespeaks a congressional intent to limit antitrust immunity in the tele-communications field to § 221(a) situations. This argument is unpersuasive. *See United States* v. *NASD*, 422 U.S. 694, 720 (1975) (where immunity was inferred under § 22(f) despite the inapplicability of the express immunity granted by § 22(d) of the Investment Company Act of 1940, (15 U.S.C. § 80a-22(d), (f) (1970)); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 305-310, 320 (1963) (implied immunity applicable to transactions that could not be immunized under express immunity provision of § 414 of the Federal Aviation Act (40 U.S.C. § 1384 (1970)); *Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, No. 74-1282, slip op. at 1200 (9th Cir. June 9, 1977) ("despite a grant of express immunity that does not cover the conduct charged, antitrust immunity may still be implied.") *See also AT&T* v. *General T. & E. Corp.*, 518 F.2d 913, 919 (9th Cir. 1975).

4. *See United States* v. *AT&T*, No. 74-1698, slip op. at 6-7 (D.D.C. November 24, 1976) (order denying motion to dismiss); Note, *AT&T and the Antitrust Laws*, 85 Yale L.J. 254, 269-70 n. 76 (1975).

5. S. Rep. No. 781, 73d Cong. 2d Sess. at 3 (1934).

6. *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 94 (1953), *Hawaiian Telephone Co.* v. *FCC*, 498 F. 2d 771, 776 (D.C. Cir. 1974). *See Panel, the Role of Competition in Transportation and Communications*, 39 Antitrust L.J. 465, 476-79 (1970) (remarks of FCC Commissioner Kenneth Cox).

7. Memorandum of FCC as *Amicus Curiae* at 12, *United States* v. *AT&T*, Civil No. 74-1698 (D.D.C. filed November 20, 1974) (footnote omitted).

8. *AT&T "Foreign Attachment" Tariff Revisions*, 15 F.C.C. 2d 605 (1968), *reconsideration denied*, 18 F.C.C. 2d 871 (1969).

9. Phonetele's argument that defendants Western Electric and Bell Laboratories are not companies subject to the regulation of the FCC, and therefore should not be relieved under a theory of implied immunity, is not persuasive. These two defendants are accused of conspiring with AT&T within the highly regulated telecommunications sphere, and therefore are not charged with any acts that can escape FCC regulation.

Cf. Gordon v. *NYSE*, 422 U.S. 659 (1975), where the Court concluded that pervasive SEC regulation of commission rates charged by the New York and American Stock Exchanges warranted implied antitrust immunity for the regulated Exchanges *and* for two of their member firms who were also defendants. The SEC supervision that the Court found determinative regulated the Exchanges and not their member firms.

Moreover, the FCC has significant regulatory power over the vertical relationship of regulated firms. *See* 47 U.S.C. § 215 (1970), which gives the FCC the authority to inquire into the transactions of regulated common carriers with non-regulated entities that are likely to affect adversely the carrier's ability to render adequate service to the public at reasonable cost.

10. For a comprehensive consideration of these factors, *see* Note, *AT&T and the Antitrust Laws*, 85 Yale L.J. 254 (1975).

11. The recently decided case of *Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, No. 74-1282 (9th Cir. June 9, 1977) is not to the contrary. There the Interstate Commerce Commission (ICC), applying a "public interest" standard (49 U.S.C. § 5(2)), approved Greyhound's acquisition of four bus companies whose routes encircled those of Mt. Hood Stages. However, the ICC had predicated its approval of the acquisitions upon Greyhound's pledge to continue to book its through-passengers on Mt. Hood Stages' lines whenever that would provide the most direct route. When Greyhound reneged on this promise, Mt. Hood Stages instituted an antitrust action and secured a judgment on a jury verdict. On appeal Greyhound pursued unsuccessfully a claim of implied antitrust immunity.

The court reasoned that the ICC had not authorized Greyhound's challenged actions when it approved the acquisitions, and in fact, was assured that such conduct would not occur. Thus, the antitrust case did not overlap the "precise ingredients" of any regulatory proceedings. In the present action, AT&T is not accused of similar attempts to subvert the FCC's determined effort to supervise interconnection. Instead, AT&T is charged with misconduct in the issuance of tariffs, an area at the center of the Commission's regulatory jurisdiction. Accordingly, the application of the antitrust laws here would intrude into the domain of the FCC, a result not required by *Mt. Hood Stages*.

12. Phonetele's contention that some of the defendants' alleged misconduct is within the exclusive jurisdiction of state regulatory agencies, and thus escapes the FCC's supervisory authority, is not persuasive. State supervision over significant issues that relate to the interconnection of customer-provided equipment has been preempted by FCC regulation. *North Carolina Utilities Commission* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied* U.S. , 97 S.Ct. 651, 50 L. Ed. 2d 631 (1976). Thus, it is extremely doubtful that any substantial misconduct in this field will elude the regulatory net cast by the FCC.

13. See n. 6, *supra*.

Appendix D

A-79

(Filed March 31, 1982)

ORDER

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 77-3877
77-2936

PHONETELE, INC.,
Plaintiff-Appellant,

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INCORPORATED; BELL TELEPHONE LABORATORIES, INCORPORATED,
Defendants-Appellees.

DASA CORPORATION, ETC.,
Plaintiff-Appellant,

vs.

GENERAL TELEPHONE COMPANY OF CALIFORNIA, *et. al.*,
Defendants-Appellees.

Before: KENNEDY and FLETCHER, Circuit Judges, and CLAIBORNE,* District Judge.

Judges Kennedy and Fletcher have voted to deny the petitions for rehearing in the above cases, and Judge Claiborne votes to grant the petitions for rehearing. Judges Kennedy and Fletcher have voted to reject the suggestions for a rehearing en banc, and judge Claiborne has recommended granting the suggestions for rehearing en banc.

The full court has been advised of the suggestions for en banc hearing, and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied, and the suggestions for rehearing en banc are rejected.

* Honorable Harry E. Claiborne, Chief Judge, United States District Judge for the District of Nevada, sitting by designation.

Appendix E

Statutory Provisions Involved

Sherman Act

Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1 and 2, provide in pertinent part:

> § 1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty*
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .
>
> § 2. *Monopolizing trade a misdemeanor; penalty*
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . .

Clayton Act

Section 3 of the Clayton Act, 38 Stat. 730, as amended, 15 U.S.C. § 14, provides in pertinent part:

> § 14. *Sale, etc., on agreement not to use goods of competitor*
>
> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee

or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Communications Act of 1934

Title I, Sections 1, 2 and 3 of the Communications Act of 1934, 48 Stat. 1064, as amended, as codified in 47 U.S.C. §§ 151, 152 and 153, provides in pertinent part:

§ 151. *Purposes of chapter; Federal Communications Commission created*

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

§ 152. *Application of chapter*

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio,

which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; . . .

§ 153. *Definitions*

For the purposes of this chapter, unless the context otherwise requires —

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

. . .

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of subchapter II of

this chapter (other than section 223 of this title), include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

. . .

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Title II, Sections 201, 202, 203, 204, 205, 213, 214 and 215 of the Communications Act of 1934, 48 Stat. 1064, as amended, as codified in 47 U.S.C. §§ 201-205, 213-215, provides in pertinent part:

§ 201. *Service and charges*

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . .

§ 202. *Discriminations and preferences*

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

. . .

§ 203. *Schedules of charges; filing with Commission; changes in schedules; overcharges and rebates; penalty for violations*

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the

Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b)(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after ninety days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than ninety days.

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

. . .

§ 204. *Hearings on new charges; suspension pending hearing; refunds*

(a) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or an increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or increased charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and

decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, the burden of proof to show that the increased charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a) of this section.

§ 205. *Commission authorized to prescribe just and reasonable charges; penalties for violations*

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter,

the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

. . .

§ 213. *Valuation of property of carrier*

(a) The Commission may from time to time, as may be necessary for the proper administration of this chapter, and after opportunity for hearing, make a valuation of all or of any part of the property owned or used by any carrier subject to this chapter, as of such date as the Commission may fix.

(b) The Commission may at any time require any such carrier to file with the Commission an inventory of all or of any part of the property owned or used by said carrier, which inventory shall show the units of said property classified in such detail, and in such manner, as the Commission shall direct, and shall show the estimated cost of reproduction new of said units, and their reproduction cost new less depreciation, as of such date as the Commission may direct; and such carrier shall file such inventory within such reasonable time as the Commission by order shall require.

(c) The Commission may at any time require any such carrier to file with the Commission a statement showing the original cost at the time of dedication to the public use of all or of any part of the property owned or used by said carrier. For the showing of such original cost said property shall be classified, and the original cost shall be defined, in such manner as the Commission may prescribe; and if any part of such cost cannot be determined from accounting or other records, the portion of the property for which such cost cannot be determined shall be reported to the Commission; and, if the Commission shall so direct, the original cost thereof shall be estimated in such manner as the Commission may prescribe. If the carrier owning the property at the time such original cost is reported shall have paid more or less than the original cost to acquire the same, the amount of such cost of acquisition, and any facts which the Commission may require in connection therewith, shall be reported with such original cost. The report made by a carrier under this subsection shall show the source or sources from which the original cost reported was obtained, and such other information as to the manner in which the report was prepared, as the Commission shall require.

(d) Nothing shall be included in the original cost reported for the property of any carrier under subsection (c) of this section on account of any easement, license, or franchise granted by the United States or by any State or political subdivision thereof, beyond the reasonable necessary expense lawfully incurred in obtaining such easement, license, or franchise from the public authority aforesaid, which expense shall be reported separately from all other costs in such detail as the Commission may require; and nothing shall be included in any valuation of the property of any carrier made by the Commission on

account of any such easement, license, or franchise, beyond such reasonable necessary expense lawfully incurred as aforesaid.

(e) The Commission shall keep itself informed of all new construction, extensions, improvements, retirements, or other changes in the condition, quantity, use, and classification of the property of common carriers, and of the cost of all additions and betterments thereto and of all changes in the investment therein, and may keep itself informed of current changes in costs and values of carrier properties.

(f) For the purpose of enabling the Commission to make a valuation of any of the property of any such carrier, or to find the original cost of such property, or to find any other facts concerning the same which are required for use by the Commission, it shall be the duty of each such carrier to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and to cooperate with and aid the Commission in the work of making any such valuation or finding in such manner and to such extent as the Commission may require and direct, and all rules and regulations made by the Commission for the purpose of administering this section shall have the full force and effect of law. Unless otherwise ordered by the Commission, with the reasons therefor, the records and data of the Commission shall be open to the inspection and examination of the public. The Commission, in making any such valuation, shall be free to adopt any method of valuation which shall be lawful.

. . .

(h) Nothing in this section shall impair or diminish the powers of any State commission.

§ 214. *Extension of lines; certificate of public convenience and necessity; discontinuance of service.*

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: . . . *Provided further,* That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however,* That nothing in this section

shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this

section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States $100 for each day during which such refusal or neglect continues.

§ 215. *Services, equipment, etc.; examination of transactions by Commission*

(a) The Commission shall examine into transactions entered into by any common carrier which relate to the furnishing of equipment, supplies, research, services, finances, credit, or personnel to such carrier and/or which may affect the charges made or to be made and/or the services rendered or to be rendered by such carrier, in wire or radio communication subject to this chapter, and shall report to the Congress whether any such transactions have affected or are likely to affect adversely the ability of the carrier to render adequate service to the public, or may result in any undue or unreasonable increase in charges or

in the maintenance of undue or unreasonable charges for such service; and in order to fully examine into such transactions the Commission shall have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, of persons furnishing such equipment, supplies, research, services, finances, credit, or personnel. The Commission shall include in its report its recommendations for necessary legislation in connection with such transactions, and shall report specifically whether in its opinion legislation should be enacted (1) authorizing the Commission to declare any such transactions void or to permit such transactions to be carried out subject to such modification of their terms and conditions as the Commission shall deem desirable in the public interest; and/or (2) subjecting such transactions to the approval of the Commission where the person furnishing or seeking to furnish the equipment, supplies, research, services, finances, credit, or personnel is a person directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier; and/or (3) authorizing the Commission to require that all or any transactions of carriers involving the furnishing of equipment, supplies, research, services, finances, credit, or personnel to such carrier be upon competitive bids on such terms and conditions and subject to such regulations as it shall prescribe as necessary in the public interest.

(b) The Commission shall investigate the methods by which and the extent to which wire telephone companies are furnishing wire telegraph service and wire telegraph companies are furnishing wire telephone service, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable.

(c) The Commission shall examine all contracts of common carriers subject to this chapter which prevent the

other party thereto from dealing with another common carrier subject to this chapter, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable.

Appendix F

A-96

(Filed Dec. 5. 1974)

COMPLAINT FOR TREBLE DAMAGES AND EQUITABLE RELIEF FROM DENIAL OF ACCESS TO MARKETPLACE FOR CUSTOMER TERMINAL EQUIPMENT BY ANTI—TRUST ABUSE OF COMMUNICATION MONOPOLY

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(213) 278-8011

Attorneys for Plaintiff

PHONETELE, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL ACTION NO.
CV 74 3566 FW

PHONETELE, INC.,

Plaintiff

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INCORPORATED; BELL TELEPHONE LABORATORIES, INCORPORATED,

Defendants.

Claims For Relief Are Based On:

A. Restraint of Trade;
B. Monopolization, and
C. Tying Arrangements.

Plaintiff, as and for its claims for relief against defendants, alleges:

I

Jurisdiction and Venue

1. This complaint is filed and this Court has jurisdiction of this action under Section 4 of the Sherman Act (15 U.S.C. §4) and Sections 4, 15 and 16 of the Clayton Act (15 U.S.C. §§15, 25, 26), to recover damages and secure injunctive relief for defendants' violations of Section 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2) and Section 3 of the Clayton Act (15 U.S.C. §14).

2. The unlawful acts alleged herein, including the combinations and conspiracies to restrain trade, the monopolization of interstate trade and commerce, the combinations and conspiracies to monoploize, and the effecting of unlawful tying arrangements, have been conceived, carried out and made effective within the Central District of California. Many of the unlawful acts done pursuant thereto have been performed within the Central District of California. The interstate trade and commerce described in this complaint are carried on in part within this district. Each of the defendants transacts business, may be found, or has or has had agents within this district.

II

Description of Phonetele

3. Phonetele (sometimes "the Company") is a California corporation with annual sales approaching $1,000,000. All of these sales have been unwillingly confined to the State of California, as will more fully appear herein, with the exception of installations for the New York Times and for the Lincoln Telephone Company, an independent telephone company located in Nebraska.

4. The Company has been engaged in extensive research, electronic design, invention, and the manufacturing of state of the art equipment in the telecommunications field. As a result of these efforts, Phonetele has developed unique skill in the solid state electronic engineering of what is generally described as telephone restriction equipment.

5. The restriction equipment invented by Phonetele has been sold and installed in Los Angeles County since the latter months of 1970. The Company has been principally engaged in the business of developing and manufacturing such equipment since that time. For purposes of this complaint the initial product and its later developments and engineering generations will be referred to by its trademark, the "Phonemaster".

6. As a one product company manufacturing and selling privately owned telecommunications equipment, Phonetele most purely embodies the multitudinous independent manufacturers nationally attempting to penetrate this market. Phonetele is one of the oldest independent manufacturers of privately owned telecommunications equipment to the end user, and has actually been designing, selling, and installing the Phonemaster for approximately five years.

III

IDENTITY OF THE PRODUCT

7. The Phonemaster is an advanced solid state, special purpose computer. It is designed specifically to interface with the national telephone network. A telephone subscriber ("customer") who purchases the equipment has it connected on his premises, at his terminal ("customer provided terminal equipment"). The Phonemaster owner is then able to restrict outgoing telephone calls to selected area codes or exchange prefixes and/or to certain lines. As a result, the owner is able to control his telephone service calling areas and lines and the amount of telephone service charges he incurs. The Phonemaster serves a subscriber need which has not been met by the defendants.

8. The equipment works by monitoring outgoing dial signals, translating and comparing them to a memory. The calls are then allowed or disallowed based upon a predetermined memory program in the Phonemaster programmed to the owner's specifications. The equipment thereby terminates those calls which have

been improperly placed. A symphonic tone indicates to the calling party that he has dialed an unauthorized area or on an unauthorized line.

9. The Phonemaster operates on the owner's premises. The symphonic tone is one between the owner's switchboard and his individual telephones. Signals are not sent to the central telephone office; by its monitoring concept and design, the Phonemaster does not operate by transmitting signals out over the telephone network.

10. Each individual dialing an owner's telephone is compelled by the Phonemaster to utilize the owner's telephone service in the most economic and efficient manner, both for the owner, and for the telephone network. Benefits of the Phonemaster include preventing unauthorized calls, and the correct use of available lines at any given Phonemaster location.

11. Many large consumers of telephone service, e.g. government entities, banks, insurance companies, or industrial concerns, purchase special kinds of telephone service or lines. These lines include various types of WATS, foreign exchange and tie-lines. Once such service is installed, there is an immediate and inherent problem. Employees may fail to use the correct lines in placing their calls. Therefore, charges appear on the subscriber's telephone bills that would not have been incurred had the proper lines been used. Without dialing control, as provided by the Phonemaster, the subscriber's desired economies for his telephone service are frequently not realized in practical operation.

12. The Phonemaster enforces the proper use of available lines, as well as preventing unauthorized calls, enabling subscribers to effect the use and economies intended for their telephone service. Moreover, the equipment can be programmed to enable designated personnel to have wide calling access from their phones, while others have a limited calling access.

13. Although the Phonemaster sells for $3,000 to $50,000, or more, per installation, a facility which has purchased a $50,000 Phonemaster, for example, achieved a savings of approximately $30,000 per month on the cost of their telephone service.

IV

THE DEFENDANTS

14. American Telephone and Telegraph Company ("AT&T"), Western Electic Company, Incorporated ("Western Electric"), and Bell Telephone Laboratories, Incorporated ("Bell Laboratories") comprise the "Bell System" and are all corporations organized under the laws of the State of New York, with their principal offices in New York City, New York.

15. AT&T is the parent company of the Bell System and owns total or controlling interest in all of its 21 principal operating telephone companies, and has large minority interests in two affiliated operating telephone companies (all 23 are "Operating Companies"). It has a royalty agreement with each of its telephone operating companies. AT&T and the Operating Companies provide approximately 80% of the nation's telephone lines and enjoy this position as a regulated monopoly. AT&T is believed to have a complete monopoly over the approximately 1,700 independent telephone companies by virtue of the fact that their telephone lines are interconnected, out of necessity, to the interstate lines maintained exclusively by AT&T.

16. Western Electric is wholly owned by AT&T. Western Electric has "Supply Contracts" with each of the Operating Companies as well as with AT&T. It manufactures communications apparatus and equipment, including customer terminal equipment.

17. Bell Laboratories is jointly owned by AT&T and Western Electric, each owning one half of its outstanding shares of stock. Bell Laboratories conducts, for the account of Western Electric, development and design work relating to Bell System products.

This includes the development of customer terminal equipment to be manufactured by Western Electric, and in turn supplied to AT&T and the Operating Companies.

18. In 1973 AT&T's consolidated operating revenues exceeded $23,000,000,000, and Western Electric's operating revenues exceeded $7,000,000,000.

V

CO-CONSPIRATORS

19. Plaintiff is informed and believes and thereon alleges that various entities and persons not named as defendants, but herein named as co-conspirators, participated in the conspiracies alleged herein and have done acts and made statements in furtherance thereof. These entities and persons include various Bell System Operating Companies, their officers, directors and employees, and others not presently named.

VI

NATURE OF THE TRADE AND COMMERCE IN CUSTOMER PROVIDED TERMINAL EQUIPMENT

20. AT&T is required by the Federal Communications Commission ("FCC") to file official tariffs with respect to its interstate business, and the Operating Companies are required to file tariffs by state commissions or municipalities, with respect to their intrastate business.

21. The tariffs of AT&T and the Operating Companies are regulations promulgated, without notice, by AT&T and the Operating Companies themselves. These tariffs govern the practices and charges to be followed, and are recognized with force of law. The tariffs, in turn, serve as a report to the respective commissions on the practices and charges of the telephone companies. In absence of objection by those who were able to acquire knowledge

that a tariff had been filed, the tariffs normally become automatically effective within 30 days of filing with the FCC or the respective state agency. Plaintiff is informed and believes, and thereon alleges, that in all cases the tariffs go automatically effective without the benefit of the considered judgment of the responsible commissions provided by formal hearings. The Operating Companies file conforming tariffs to those filed by AT&T. Independent telephone companies likewise file or follow conforming tariffs.

22. Prior to 1969, AT&T and the Operating Companies had tariffs on file with the FCC which blanketly prohibited telephone subscribers from installing (interconnecting) customer provided terminal equipment with the national telephone network. There was an absolute prohibition against customer provided terminal equipment.

23. In 1968, the FCC issued the landmark decision, *In the Matter of Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420, holding that the above-described tariffs of AT&T be stricken as invalid, unlawful and unreasonably discriminatory. AT&T argued the *Carterfone* case on behalf of itself and the Operating Companies.

24. Following this FCC decision, AT&T filed revised tariffs (FCC 263), effective January 1, 1970, and caused the Operating Companies to file conforming local tariffs with respect to their intrastate business. These tariffs, as is usual, became effective without formal hearing, and their legality has never been ruled upon. The new tariffs permit certain types of customer provided terminal equipment to be connected to the telephone network, but only by means of a "connecting arrangement", and upon fixed charges.

25. The tariff provisions governing customer terminal equipment specified in FCC 263 or conforming tariffs do not, however, as written, embrace the Phonemaster. Nevertheless, only in California, and only if the California purchaser acquiesces to the connecting arrangement and its attendant charges, is he then allowed to use the Phonemaster. These charges in California

have been held in abeyance by Phonetele only by means of a lengthy and expensive legal battle which culminated in the Supreme Court of the State of California. *Phonetele* v. *PUC* 11C 3d 125, Cal Rptr, P 2d (1974).

26. The connecting arrangement is specified hardware which is supplied by AT&T or the respective Operating Companies. The charge for the installation, and the monthly "service" charge provided by the tariffs for the utilization of connecting arrangements, provide considerable revenue to AT&T and the Operating Companies.

27. Since the decision in *Carterfone*, a new and substantial industry for the development, manufacture and sale of telephone equipment was potentially opened to companies which were not owned or controlled by defendants. Phonetele is informed and believes, and thereon alleges, that the capital value of telephone terminal equipment in the field is in excess of $11,250,000,000 and the Phonemaster enjoys a small yet firmly entrenched share of this market because of its innovations, design, reliability, and length of time in the marketplace. The Phonemaster serves a need that was, and is not, being met by defendants.

VII

Economic Interests

28. The sale of Phonemaster conflicts with the economic interests of AT&T and the Operating Companies in three respects. First, the Phonemaster is in direct competition with the older relay technology equipment provided by the Operating Companies, in some cases, to perform the somewhat similar, but rudimentary, restriction functions. Whenever this equipment is replaced by the Phonemaster, AT&T and the Operating Companies lose substantial revenues, and sizable capital investments.

29. Second, the Phonemaster equipment results in a substantial reduction of AT&T and the Operating Companies' revenues,

because it restricts unauthorized and incorrect telephone usage which could be made from an owner's premises and provides for efficient use of telephone service.

30. Third, the requirement that Phonemaster purchasers use a connecting arrangement, with its attendant charges, creates delays in installation and operational difficulties; therefore, a state of uncertainty results. This result is in the economic interests of the defendants, for it is believed the effect has been to forestall competition for sufficient time to allow the defendants to develop both a competitive product to the Phonemaster and a marketing counter-offensive strategy.

VIII

CHARGING ALLEGATIONS

31. Defendants have unlawfully:

A. Combined, conspired, and agreed to restrain trade and commerce in the marketing, sale and distribution of the Phonemaster;

B. Monopolized, and combined and conspired to monopolize, the terminal equipment market; and

C. Effected tying arrangements.

Such conduct and acts are in violation of Sections 1 and 2 of the Sherman Act, and Section 3 of the Clayton Act. The combination, conspiracy and agreements consist of continued agreements, concert of action, and ownership and directorship control among defendants and their co-conspirators. The violations of the above statutory Sections have been by means and methods known to the defendants, but including the following, among others.

32. In early 1970, following their filing of tariff FCC 263, AT&T and the Operating Companies caused to be filed with state and local agencies, respectively, conforming tariffs which required that customer provided terminal equipment be interconnected only by means of a connecting arrangement.

33. In furtherance of this combination and conspiracy, and by virtue of a total monopoly over the national telephone lines, AT&T and the Operating Companies actively enforce the tariff for "connecting arrangements" arbitrarily to require "protective connecting arrangements".

34. AT&T and the Operating Companies have filed, enforced, and interpreted their tariffs so far as they concern the Phonemaster with a full knowledge that under the tarriffs, the connection of the Phonemaster to the telephone network is not covered and, even if covered, the connection of the Phonemaster can be effected within the specified terms of the tariffs themselves by means of a simple terminal block. The terminal block is a device which is simple in technology and inexpensive in cost to the telephone subscriber.

35. In California, the responsible Operating Company has required a protective connecting arrangement, by which it allows Phonetele's customers to connect the Phonemaster within the State of California to the telephone network. This protective connecting arrangement, called the ZZAGM, is needlessly expensive. Nevertheless, in the State of California, Phonetele has been allowed to sell and connect its equipment through use of the ZZAGM, with its attendant installation and monthly service charges to the subscriber.

36. In December 1970, defendants represented to Phonetele the ZZAGM was the national or Bell System connecting arrangement for the Phonemaster. Nevertheless, AT&T refused to employ the ZZAGM on an interim basis outside of California until the alleged Bell System connecting arrangement was developed, more than three years after the December, 1970 false representation to Phonetele.

37. Other than the State of California, and other than one installation at the New York Times in New York City, installed in March, 1974, and one installation at Lincoln Telephone Company for use in their own central office facility, the defendants and the Operating Companies have exercised their monopoly power

and in furtherance of their combination and conspiracy had not made available a connecting arrangement for installation of the Phonemaster. Consequently, Phonetele had not been allowed to connect the Phonemaster to the telephone network on a national basis until March 1974.

38. This non-availability had been despite Phonetele's continued insistence and good faith negotiations with defendants and the various Operating Companies, to allow the Phonemaster connection. Phonetele believes since the New York Times installation in March, 1974, the Phonemaster can now be installed outside of the State of California.

39. The connecting arrangement finally made available at the New York Times is called the CTH. The monthly service charges to the subscriber for this connecting arrangement, however, are approximately 3½ times the charges for the ZZAGM in California. Both connecting arrangements purportedly serve identical functions of alleged "network protection".

40. In view of AT&T's and the Operating Companies' unlawful enforcement of their tariffs to require protective connecting arrangements for installation of the Phonemaster, Phonetele submitted a written request for a Declaratory Ruling from the FCC that FCC 263 did not cover the Phonemaster. On August 30, 1974 Walter Hinchman, Chief of the Common Carrier Bureau of the FCC, rendered a favorable Declaratory Ruling for Phonetele, attached as Exhibit A and incorporated herein by reference.

41. AT&T and the Operating Companies cause terminal equipment to be leased to telephone subscribers. The leases contractually make the subscribers subject to a basic termination charge if the subscriber makes a decision to replace defendants' leased equipment with independently manufactured customer provided terminal equipment. This practice hampers the subscribers' freedom of choice and denies independent manufacturers, like Phonetele, free and fairly competitive access to the marketplace for telephone terminal equipment.

42. Defendants are engaged in a course of commerce as a regulated monopoly which leases telephone lines to the public telephone subscriber within the United States. From this monopoly and position, defendants have unlawfully lessened competition and created a monopoly in the market for telephone terminal equipment because AT&T and the Operating Companies are leasing their telelines on the condition, with the agreement, and with an understanding that the telephone subscsriber shall not purchase, use or deal in the goods or equipment of independent telephone equipment manufacturers as Phonetele without great uncertainty and peril, due to connecting arrangements and the attendant costs, as interpreted, and enforced by AT&T and the Operating Companies.

IX

EFFECTS OF VIOLATIONS

43. The effects of defendants' violations has been without limitation, as intended by defendants, to:

In all Markets

(a) Place an unfair burden upon Phonetele to compete against equipment sold by defendants, which they install without a connecting arrangement, and has forced Phonetele and its customers to encounter unnecessary design and installation problems and costs caused by the cumbersome protective connecting arrangement itself, which would not be encountered by the Company if the Phonemaster were connected to the telephone network in a reliable, economical manner;

(b) Deprive Phonetele of the ability to obtain critical financing because of uncertainties necessarily thrust upon Phonetele's marketing efforts creating inability to construct valid marketing projections, and to conduct a viable national sales and marketing program;

(c) Require installation of the Phonemaster only by means of a protective connection arrangement;

(d) Jeopardize Phonetele's lead time and leadership gained by early development, marketing and installation of its telephone restriction equipment so that defendants

and independent competitors or potential competitors can now more effectively compete with Phonetele in the telephone restriction equipment market.

Outside California

(e) Deny Phonetele means or ability to market or install the Phonemaster to the telephone network and thus deny Phonetele access to the national market for customer provided terminal restriction equipment, in restraint of trade and commerce;

(f) Eliminate and preclude competition and potential competition in telephone restriction equipment and to render impossible economical and desired usage of telephone service by means of the Phonemaster;

(g) Deprive telephone subscribers of equipment which is privately beneficial;

In California

(h) Impede and prevent sales of the Phonemaster because of requirement of the ZZAGM which was unreliable, unnecessarily and unreasonably expensive;

(i) Force Phonetele to absorb the price of the ZZAGM in the pricing of its equipment making it more expensive to the customer with no increase in revenues to Phonetele;

(j) Cause Phonetele to incur unnecessary delays, costs and servicing problems in the installation of the Phonemaster and cause Phonetele to lose credibility in the marketplace by such delays;

In New York

(k) Require the New York Times to pay artificial and unreasonably high and unnecessary installation and ongoing "service" charges for the protective connecting arrangement (CTH) which AT&T and the respective Operating Company required the New York Times to utilize in conjunction with the installation of the Phonemaster. The total price of the CTH and the Phonemaster to New York subscribers hampers Phonetele's marketing efforts.

X

DAMAGES

44. As a direct and proximate result of defendants' violations and the resulting effects, plaintiff has been damaged in its business and property in an amount, proof of which will be offered at trial, but believed to be in excess of $30,000,000, then trebled, as provided by law. As a direct and proximate result of the conduct of defendants, which is continuing, plaintiff has suffered, and will suffer, further irreparable injury and damages for which there is no adequate remedy at law.

XI

RELIEF SOUGHT

WHEREFORE, plaintiff, PHONETELE, INC., prays that:

A. Defendants, and each of them, be adjudged to have combined and conspired to restrain and to monopolize interstate trade and commerce, to have monopolized such trade and commerce, and to have effected tying arrangements in violation of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act;

B. Plaintiff be awarded judgment against defendants, and each of them, for three-fold the damages it has sustained by reason of these violations, the amount of which is not known but will be proved at trial, and upon information and belief will exceed $30,000,000, then trebled by the Court.

C. Defendant, AT&T, be temporarily and permanently restrained and enjoined from filing, or causing to be filed by its Operating Companies, any tariff which provides for connection of the Phonemaster to the telephone network by means of a connecting arrangement other than by a simple terminal block, at a nominal one-time installation charge.

D. Defendant AT&T and its respective Operating Company in New York be ordered to rebate or otherwise properly credit to the New York Times of New York, New York, substantial service charges which have been

incurred by unlawful use of the CTH connecting arrangement in conjunction with the Phonemaster installation at the New York Times.

E. Defendant AT&T be temporarily and permanently restrained and enjoined, or causing to be enforced by its Operating Companies, any provisions regarding basic termination charges when defendants' equipment is replaced by the Phonemaster.

F. Defendant AT&T be ordered to fulfill its regulated carrier responsibility by causing the Phonemaster to be tariffed nationwide by the Operating Companies and that AT&T be ordered to cause the Operating Companies to offer the Phonemaster for sale or lease, particularly and without limitation, to offer for sale or lease at those locations where defendants' equipment is now being used.

G. Defendant be permanently restrained and enjoined from treating any damages and costs of this litigation as an operating expenses chargeable to its subscribers, but rather any damages and costs should be borne by their shareholders.

H. Plaintiff be awarded the cost of this suit, including reasonable attorneys' fees; and

I. Plaintiff be awarded such other and further relief as this Court deems just and proper.

/s/ RICK M. STEIN
Rick M. Stein

/s/ PAUL S. SIGELMAN
Paul S. Sigelman

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[Letterhead of Federal Communications Commission]

August 30, 1974

Rick M. Stein, Esquire
Sigelman & Stein
9595 Wilshire Boulevard
Beverly Hills, California 90212

Dear Mr. Stein:

This refers to your letter of August 22, 1973, in which you request a ruling with respect to the "Phonemaster" devices similar to that given to Telephonic Equipment Corporation in a letter of July 11, 1973 from the Chief, Domestic Rates Division relating to the "telepatcher" device. Specifically, you ask for a ruling on the question of whether Tariff FCC No. 263 of AT&T requires a "protective connecting arrangement" to be used with the Phonemaster devices.

It is our understanding that the Phonemaster is a solid state mini computer which monitors signals on the telephone line and transmits a tone "restrict" signal to the calling station if an unauthorized number is called and opens the circuit thereby blocking any such unauthorized call.

AT&T's Tariff FCC No. 263, which governs interstate and foreign Long Distance Telecommunications Service, provides at Section 2.6 that for direct, electrical connection of certain types of customer-provided equipment to telephone company facilities, such connection must be made through a connecting arrangement provided by the telephone company. We interpret your letter as questioning whether or not the use of a simple terminal block to connect customer-provided Phonemasters would be in accordance with AT&T's Tariff FCC No. 263.

The word "protective" does not appear in AT&T's tariff regulations applicable to the Phonemaster, nor does any word of similar import appear therein. Therefore, insofar as AT&T's interstate

Tariff FCC No. 263 is concerned, the "connecting arrangement" required therein need not be "protective." The provision of a simple terminal block by the telephone company would, in our view, constitute a "connecting arrangement" within the meaning of AT&T's tariff for interstate and foreign toll services.

Moreover, insofar as AT&T's interstate Tariff FCC No. 263 is concerned, it is not clear to us that a connecting arrangement of any type is required for the Phonemaster. The types of customer-provided equipment covered in Section 2.6 of Tariff FCC No. 263 include: (a) Data Transmitting and/or Receiving Terminal Equipment; (b) Voice Transmitting and/or Receiving Terminal Equipment; (c) Channel Derivation devices; (d) headsets; and (e) non-powered conferencing devices. As a device which merely restricts the signals generated by conventional telephone company equipment, and thereby controls the locations to which toll calls may be placed, it is not clear that the Phonemaster can reasonably be construed as being in any of these categories. AT&T appears to contend that the Phonemaster is a "voice transmitting and/or receiving terminal equipment" because it receives "network control signals which are generated to effectuate voice connections" and it transfers "voice frequency signals" to stations through telephone company equipment. However, we find no reference to "voice frequency signals" in the tariff, nor do we believe the Phonemaster device can realistically be said to either "transmit" or "receive" network control signals as those terms are normally used. Accordingly, we do not believe that Phonemaster is a device that can reasonably be construed as being within any one of the aforementioned categories that require a "connecting arrangement." In arriving at this construction of the tariff, we recognize the rule that ambiguous tariffs shall be construed favorably to the user.

In summary, you are advised, pursuant to Section 0.91(e) of the Commission's Rules, that it is the view of the Common Carrier Bureau that AT&T's Tariff FCC No. 263 does not require a connecting arrangement for the Phonemaster and that, even if

one is required, under the tariff, a simple terminal block provided by the telephone company would, in our opinion, constitute such an arrangement within the meaning of the tariff.

Sincerely,

/s/ WALTER HINCHMAN

Walter Hinchman
Chief, Common Carrier Bureau

cc: American Telephone and Telegraph Company
Robert L. Feiner